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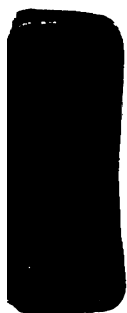
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GREAT AMERICAN LAWYERS



JAMES BRADLEY THAYER

From a photograph taken in 1895.

Great American Lawyers

The Lives and Influence of Judges and
Lawyers Who Have Acquired Permanent
National Reputation, and Have
Developed the Jurisprudence of the
United States.

A HISTORY OF THE LEGAL PROFESSION
IN AMERICA

EDITED BY
WILLIAM DRAPER LEWIS

of the University of Pennsylvania
Dean of the Law Department

VOLUME VIII

PHILADELPHIA
THE JOHN C. WINSTON COMPANY
1909

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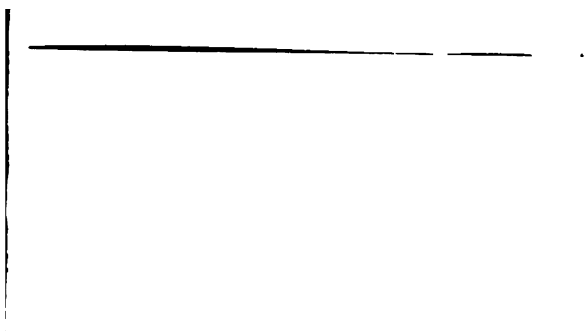
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JAMES COOLIDGE CARTER.





His physique was sturdy. In his time, college athletics were free from vice, manly in spirit, and beneficial to the body of undergraduates. He became prominent not only intellectually, but also in athletic sports, and rowed stroke oar in his class boat. Class orator and stroke oar were exemplified in him as a possible combination. His muscular development was made to aid, and not to take the place of his intellectual culture.

In his class oration, the original manuscript of which has been preserved by the Secretary of his class, it is most interesting to note the style of expression and of thought which those who knew him only in his maturity, can identify as unmistakably his own.

After his graduation, he came to New York, and spent a year in tutoring before returning to the Harvard Law School. During this year he was entered as student in the office of Kent & Davies at Number 66 Wall Street. This office was located on the second floor of an old dwelling house, and had already been occupied by a regular succession of law firms for nearly or quite a generation. At the period of Mr. Carter's entrance in the office the firm was composed of Judge William Kent, son of the famous Chancellor, and Henry E. Davies, afterwards chief-justice of the New York Court of Appeals. As Mr. Carter has himself said, his attendance at the office during this first year was but nominal.

In the fall of 1851 he returned to Cambridge for

attendance at the law school, where he remained for nearly three terms until the spring of 1853. In those days law professors lectured, and wrote text-books. In these days the professors preside over discussions and edit collections of cases. Mr. Carter listened to, and worked under, Professors Theophilus Parsons and Joel Parker, and Lecturers Luther S. Cushing and Edward G. Loring. He afterwards attained the very pinnacle of professional greatness. He would have attained like eminence under any other system of instruction, for the elements of his success were a strong understanding, an intense power of concentration, an industry almost superhuman, and a burning professional enthusiasm. His ripened choice of methods of instruction is well indicated in a paragraph which appears in one of his pamphlets on codification:

What lawyer has not had frequent occasion to feel that the abstract statements of teachers and text books, even the best, make little impression upon the mind, and that his attention does not become really fixed, nor does his understanding firmly grasp the subject upon which he is engaged, until he turns to the actual *cases* as recorded in the Reports, and finds in them the *living* law as it has been actually developed by the real transactions of men.

Early in the spring of 1853 Judge Davies called on Mr. Carter in Cambridge and asked him to take the position of managing clerk in his office. Mr. Carter accepted and returned to New York before the end of the law school term and plunged at once into the details of general practice. With this office Mr. Carter remained from the time of his entrance

into the profession until his death fifty-two years later. The year following his entrance in the office, the firm of Scudder & Carter was formed, composed of Henry J. Scudder, his brother Townsend Scudder and James C. Carter, who was then twenty-seven years old, his partners being but a few years his senior. This firm continued unchanged for twenty years, and then changed only by the death of Townsend Scudder. For twelve more years the firm continued with its two surviving partners, with additional membership, and then was dissolved by the death of Mr. Scudder. In regular succession followed the firms of Carter & Ledyard, Carter, Rollins & Ledyard, Carter & Ledyard, and Carter, Ledyard & Milburn. The partners associated with Mr. Carter during the fifty-two years besides the Scudgers already named, were George A. Black, Lewis Cass Ledyard, Daniel G. Rollins, George H. Balkam, Edmund L. Baylies, George A. Miller and John G. Milburn.

The early days of Mr. Carter's practice were the early days also of the new organization of the courts, and of the reformed procedure. The amalgamation of the tribunals of law and equity had but just been accomplished under the State Constitution of 1846, and the code of procedure was an instrument bright and new. Mr. Carter's introduction to practice was with a new code of procedure as his constant companion. He acquired a close familiarity with its provisions and with those of its bulky successors.

His opinion of them is therefore valuable. He gave it thus:

That code, although at one time made, by cautious and careful amendment, to adequately answer its purpose, has been so incessantly changed by legislation that even its principal author disowns and contemns it, and few pretend to understand it. It is to-day more embarrassing to the practitioner than it was in its original imperfect state, and what with its present condition and the multitudinous changes which are hereafter likely to be made in it, the majority of lawyers justly hold all time expended in the study of it, beyond what the exigencies of the moment require, to be misspent. Since its enactment in 1848, more than six thousand *reported* decisions (written in 1883) have been made of disputes concerning its meaning, and the unreported controversies and decisions have been vastly larger.

The young firm of Scudder & Carter soon gained a large practice. Many small cases, with one here and there of more importance, came into their hands. Their register of cases of half a century ago still remains, in the handwriting of the young partners, to attest the variety and extent of their industry. Cases in justices' courts, in the Supreme Court, and in other courts whose names are now memories, here appear, and the details of the first steps on the road of professional experience through which Mr. Carter became first an accomplished attorney and counselor at law, and afterward a master of jurisprudence and a profound lawyer, may here be studied. He drew and copied papers, served and filed them, attended motions and before many months acted as trial counsel. His abilities soon attracted attention,

and within ten years from his first entrance into the profession, he became prominent at the bar of New York, at a time when prominence at that bar meant a far higher degree of attainment or of genius than in later days. The leader was then Charles O'Connor, but there were a dozen or more worthy of his steel. Mr. O'Connor was not only the most completely learned in the law of his generation, but he was also keen in recognition of legal ability in others. He recognized it in Mr. Carter when the latter was but little more than thirty years old, and thereafter, until his retirement, sought him as associate in many cases. One of these cases, part of a litigation which lasted for nearly twenty years, served greatly to widen Mr. Carter's celebrity as a lawyer of eminent ability.

A woman who had been well known to two generations of New Yorkers as Madam Jumel, died at an advanced age in the occupancy of a stately mansion and many acres of adjacent land in the upper part of Manhattan Island. This estate became an object of attack from many directions. It was like a beleaguered fortress surrounded by attacking batteries; and when the fire of one was silenced another took it up. Mr. Carter, at first second in command to Mr. O'Connor, sustained the burden of the defense for nearly a score of years. One of the actions was that of a claimant, at the time of the trial of his case nearly eighty years of age, who based his claim upon the allegation that he was an illegitimate son of Madam Jumel. His suit was carefully planned and

ably sustained. The plan and scope of the defense was such as only a consummate legal general could have devised and executed. The investigation of facts ran back into obscure corners of society in the eighteenth century, and in various parts of the country; histories of persons long dead had to be pieced out; conspiracies uncovered and perjury exposed. With these intricate and obscured facts were coupled unusually involved questions of real property law. The case was tried twice—the first jury disagreeing—and each trial occupied two months. Mr. Carter's labors during this litigation were such as could have been sustained only by the highest quality of intellectual and physical power. His stupendous strength was tried almost to its limit, but not in vain.

It was his satisfaction to save his client's estate from every attack, and to confirm his chief victory in the Supreme Court of the United States.

In this litigation Mr. Carter's completeness of professional equipment was made apparent to the public. Profoundly learned, alert, resourceful, prepared in every detail, impressively eloquent, he overthrew and ultimately scattered the forces opposed to him. Thenceforth his title to a place in the front rank of the American bar was unquestioned.

Not long after the trial just mentioned he was called upon to carry another heavy professional load. The sudden overthrow of the Tweed ring led to an enormous litigation, offensive and defensive, by the city of New York. Large numbers of actions, in

different forms, civil and criminal, against many of the conspirators who had plundered the city treasury, were instituted and vigorously fought. In addition to these, there were scores of actions against the city to recover sums, payment of which had been held up as fraud-tainted, covering a great variety of claims—from street sweeping to armory rents. The ordinary machinery of the office of the New York Corporation Counsel was found to be utterly inadequate, and Mr. Carter's professional assistance was called for with regard to both classes of cases. He acted thus as special counsel for the city during the official term of six who successively held the office of counsel to the corporation.

Of the actions brought in behalf of the city for the recovery of plunder taken from its treasury that of the *People vs. Tweed* was of the greatest importance. The burden of the prosecution of this action was taken by Mr. Carter associated with the late Wheeler H. Peckham, with Charles O'Connor standing by, as advisory counsel.

This was in many respects one of the most remarkable trials in the history of litigation. The defense was conducted by David Dudley Field. The action was commenced, under a special statute enabling the state to sue in behalf of the city, in the spring of 1875, and tried a year later before a struck jury. The case was prepared for trial with the most patient care and the proof produced amounted to a demonstration of the correctness of the plaintiff's

claim. It was shown by the testimony of accomplices, supported by unquestioned written evidence as to every figure and detail, that a large number of claims against the city and county for work and materials were at Tweed's instigation raised to nearly three times the amount expected to be received by the claimant; that the audit and payment of these exorbitant claims was corruptly engineered by Tweed, and that of the full amount paid, thirty-five per cent was retained by the claimant, and sixty-five per cent paid over to a distributing agent of the Ring who divided it in uniform percentages among the conspirators, Tweed receiving twenty-five per cent of each looting.

Upon the trial each item of theft was identified and every stolen dollar traced in the bank accounts of the thieves. Most of the vouchers of payment were stolen from the comptroller's office, but ten complete vouchers were overlooked by the thieves. From these vouchers, with the aid of deposit slips and bank account books a complete body of proof was built up. During the trial fifty witnesses, including Governor Tilden, were examined, and nearly two hundred pieces of documentary evidence put in. The trial lasted many weeks and resulted in a verdict for the plaintiff of more than six and a half million dollars.

At the same period Mr. Carter took into his office the defense of a large number of actions against the city, and superintended the attorney work as well as acting as counsel in them all. His services to the

city of New York at this time have never been realized by more than a few of its inhabitants. His efforts saved many millions of dollars to the city treasury.

In the midst of this maze of public litigation Mr. Carter was called upon to perform another public service. Samuel J. Tilden had been elected Governor after the Tweed downfall, and was ambitious, if possible, so to reform the machinery of city government as to prevent the recurrence of such a riot of corruption as had then lately disgraced and impoverished the city of New York. To this end he secured legislative authority to appoint a commission to devise a plan for the government of cities, and appointed a commission of twelve distinguished citizens—most of them lawyers of high standing. Mr. Carter's investigations in the then pending "Ring cases" gave to him obvious qualifications for membership in this commission, and he became the member upon whom fell the greatest burden of its work. Here is to be found the origin of his work and of his ideas with reference to the cause of municipal reform to which he gave much time and attention for the next quarter century of his life. The kind of corruption with which he was brought face to face in the Ring cases was of the coarse and obvious type. The Tammany thieves of the Tweed ring practiced plain and vulgar larceny. The methods were crude and careless. The more refined and polished corruption of later days, by which public wealth is

transferred into private pockets, was not then perfected, and did not attract Mr. Carter's observation at that time.

The report of the Commission, written by Mr. Carter, evidences a great deal of hard work, but the remedies therein recommended were for symptoms only, and not for the disease, and the chief remedy proposed was one which upon the publication of the report was so generally condemned as to bring the labors of the Commission to naught. This was the recommendation that the finances of cities be placed in the charge of Boards of Finance, to be chosen by a restricted class of voters with certain property qualifications. One evil which was particularly mentioned in the report was that of the introduction of state and national politics into municipal affairs; and the argument upon this topic in the report, was repeated and amplified, for many years afterwards, by Mr. Carter in many public addresses upon municipal reform.

Twenty years after the report of this Commission, at a meeting of the National Municipal League, whereof Mr. Carter was then president, he delivered an able and interesting address in which his earlier views are restated with new arguments and illustrations. He again demonstrates the wickedness and folly of importing partisan politics into municipal administration; but adds a new element in his consideration of reform measures, concerning which he spoke in expressions of great admiration for English

recovery from the insurance collected for the steamer. Many eminent lawyers advocated the respective contentions of the various parties.¹ The later report contains a good example of Mr. Carter's method and style in the preparation of a brief for argument.

Allusion has already been made to the corruption of the Tweed Ring period. But few persons now living know of its extent and ramifications, and how, going from bad to worse, it extended through all grades of society. Even the bench and the bar were so affected that the plain signs of corruption came into view like an uncovered sore. No class was so cognizant of the social disease and its widening extent as the lawyers, and it was instinctively felt by the members of the better class of that profession that it was necessary they should gather together for the purification of the bench and bar.

No single cause was so potent as this in the formation of the Association of the Bar of the City of New York in which Mr. Carter took a leading part. No other man did so much in its entire history to give it force and direction. He was always a leader in urging and directing the performance of its public duties, and his leadership was always eagerly followed, especially by the younger members, when the time came for action. He was not only one of its founders and organizers but in later years was again

¹ The reports of the case in the Supreme Court of the United States will be found in, 105 United States Reports, 24, and 118 United States Reports, 507.

and again chosen its president, in which office he served for five terms. In the years of its early history it whipped the traffickers from the Temple of Justice, and in great measure restored the tone to a morally enervated bar. Its next great public service commenced in the later seventies, and, under Mr. Carter's direct inspiration and direction, continued for several years. This was in the opposing and final defeat of the enactment into law of the Field Civil Code.

This Code which was intended to supersede the common law of New York was mainly the work of David Dudley Field, and had been reported in the year 1865, but a serious effort for its enactment was not made until about ten years later, when more abundant leisure enabled its author to undertake it. Mr. Field was a man of extraordinary ability. He had then made a fortune in the practice of the law, and that practice had made him entirely familiar with the legislative and judicial methods of his time. He was then venerable in aspect, though not in the least infirm, most persuasive in speech, adroit to perfection, and with an easy command of his learning. He exerted a wide personal and political influence. His ambition was to procure the enactment of this Civil Code and so link his name with the most important Act in the history of the legislation of New York. As was written by Mr. Carter, "The desire to effect an improvement in the law is, surely, in the highest degree praiseworthy; and to connect one's own name

with a lasting improvement is a noble ambition. But the danger is that the gratification of the ambition or the vanity will become a motive greatly superior to the wish to effect a solid improvement—a danger to which the law has been in almost every age exposed.”

The condition of public opinion in the state at the commencement of the campaign for the enactment of the Civil Code was clearly apprehended and accurately expressed by Mr. Carter. He wrote:

We have seen the press, the public and even the Bar of the State of New York, viewing with comparative unconcern the endeavor of a few men, it might almost be said, of one man, to abrogate our system of unwritten law, to discard the principles and methods from which it has sprung, and to substitute in its place a scheme of codification borrowed from the systems of despotic nations.

To uninstructed men, and even to half-instructed men, the adoption of a plan by which they might find the law they wanted by looking into one volume instead of through a hundred, was not without its charm. To show them the fallacy of this view, to arouse, instruct and move to action a languid and at best indifferent bar was no light task. The City Bar Association was made the instrument of opposition to the Field Code. Various members were assigned to examine and criticize it in detail. Each of them wrote pamphlets embodying the results of his work, which were circulated. Mr. Carter himself examined eight sections on the law of General Average,

with such effect that the author of the Code hastily rewrote a revised version, which in its turn was demolished; but these efforts were not enough. Two legislatures passed the bill and whether it should become law or not depended upon the exercise of the veto power by two successive governors. Mr. Carter, with a committee from the Bar Association argued for a veto before each of them and in each case got it; but the snake was "scotched, not killed," and it was obvious that a wider and deeper propaganda through the bar of the state should be attempted. To this end Mr. Carter wrote his first essay on the subject in 1883, which he called "The Proposed Codification of our Common Law." It was written in a very brief period; it by no means contains all that was to be written on the subject or in every detail the final expression of his views; but it was a learned, impressive and most effective presentation of the case against the Field Code. A large edition was published and circulated by the Bar Association throughout the state and its effect in the formation of a professional public opinion against the enactment of the Code was prompt and obvious. The philosophies of legislation and of jurisprudence maintained in this essay cannot be well abridged for use in this paper, but one or two quotations of his statements of principle may be made.

Speaking of the foundation of obedience to law, he says, "Who does not know that the ultimate support upon which all laws must rest is *public opinion*?

And what is this but saying that law, in order to be obeyed and enforced, must accord with the public standard of justice?" This principle is again and again stated and illustrated in his subsequent writings and speeches, and is made the corner-stone of his lectures on jurisprudence, which he wrote toward the end of his life, the delivery of which at Harvard University was planned, but prevented by his death.

Again after maintaining the principle that *public law* should be dealt with by the Legislature, while all matters relating to the ordinary conduct of men in their personal and business relations with each other, in other words, *private law*, should be left to be dealt with by the courts, he says:

These are the dictates of science. This is the natural order; and all attempts to contravene it, while certain to be fruitful of mischief, will as certainly fail of success. If the Legislature undertake to make rules *beforehand* for the government of the ordinary relations of men with each other, its work will not stand whenever it is found not to accord with the demand for justice. That voice cannot be silenced, unless it is satisfied. It speaks with all the might of public opinion. It urges its demands in all places in and out of courts, and submission to it is inevitable. It may compel an interpretation of the statute in accordance with its demands, even against the written letter of the enactment. By successive judicial decisions harmony may be enforced between the written law and the standard of justice; and in this way the unwritten law reassert its natural and exclusive sovereignty over that province of jurisprudence which embraces the rights and duties of men in their ordinary relations with each other.

As has been said, the effect of the circulation of Mr. Carter's pamphlet upon the bar was almost im-

mediately obvious. The foundations of jurisprudence had not been, among ordinary lawyers, an attractive object of study. To many of them this was the first work upon legal philosophy which had been brought to their attention. It served its purpose. It instructed the bar, and this instruction was reflected in the subsequent legislatures. The Civil Code did not get through both houses of the Legislature again. One year, it would fail in the one; the following year in the other; and at last it died in committee.

In summing up the life work of Mr. Carter, it may be said that his greatest influence upon the law of his country is to be found in the effect of the work which he did in the preservation of the system which makes law an inductive science, capable of natural growth, development and adaptation. He was not content with the conversion of the bar of his own state, and with the defeat of the Civil Code. He took every proper occasion to lay his views before gatherings of his professional brethren in other states.

Five years after the publication of his first pamphlet, Mr. Carter addressed the Virginia State Bar Association upon the same subject. Reflection and criticism had induced him, while confirming his original conclusions, to reconstruct the argument. This he did in a masterly address which he entitled "The Provinces of the Written and the Unwritten Law."

The first pamphlet had a particular purpose, that of aiding in the defeat of legislating the Field Code into a statute. It was written in controversial style,

and in a controversial spirit. It was an instrument of intellectual warfare, and designed for hard blows. The later address left the Field Code out of sight altogether and entirely rearranged the argument against codification as a means of improving the law. It treated the philosophy of law in the spirit of a philosopher. In a prefatory note it is said:

The new aspect now given to the argument is to lay down as its foundation the proposition that human transactions, especially private transactions, can be governed only by the principles of justice; that these have an absolute existence, and cannot be *made* by human enactment; that they are wrapped up with the transactions which they regulate, and are *discovered* by subjecting those transactions to examination; that the law is consequently a *science* depending upon the observation of facts, and not a *contrivance* to be established by legislation, that being a method directly antagonistic to science.

In the later address, the principle is noted that while ideal justice is humanly unattainable, yet the ideal should ever be kept in view, and effort directed toward it. At the meeting of the American Bar Association in 1890 this principle was made the text of an address by Mr. Carter which he called "The Ideal and the Actual in the Law."

It is in the line of his previous productions but carries the discussion to a higher plane; and with great literary excellence, supports the theory that law is, and should continue to be an inductive science, proceeding in its development from facts to principles; that it is not in its nature a command from a superior to an inferior, but is to be ascertained from

custom and opinion, and the application of the general standard of justice, as developed in the settlement of actual controversies.

The reflections given forth in these pamphlets and addresses were the products of Mr. Carter's leisure, during the most important period of his professional career. It would serve no useful purpose to attempt to make anything approaching a complete review of his professional employments. He acted as counsel in a great many important cases in the courts of New York state, among which may be mentioned the *Singer*, *Tilden*, *Hamersley* and *Fayerweather* will cases, each of which involved the disposition of great fortunes.

In the last years of his active career he argued many cases before the Supreme Court of the United States. Some of these may be more particularly mentioned, to indicate the wide scope and great importance of the questions involved.

In 1888 he argued for the appellant the case of *Ping vs. United States*,² in which the treaty with China, the Chinese Exclusion Act, and the power of Congress to legislate in disregard of treaty obligations were the questions discussed. In 1891 he argued for the appellant the case of *Counselman vs. Hitchcock*,³ involving the constitutional right of a witness to decline to give incriminating testimony; and in the same year the cases of *Ex parte Rapier*

² 130 United States Reports, 581.

³ 142 United States Reports, 547.

and Dupre,⁴ involving the constitutionality of the legislation prohibiting the use of the mails for the circulation of lottery advertisements; which was questioned upon the grounds that it was outside of the powers granted to Congress, as well as an interference with the liberty of the press. Mr. Carter's brief is printed nearly in full in the official report of the case, and is worthy of examination, especially with reference to its review of the law of libel, and the history of the principle of free discussion. In 1892, he argued for the appellant the case of Cameron vs. United States,⁵ in which was involved questions of land title under Mexican grants and the operation thereon of Congressional legislation. In 1893, he argued for the appellee the case of Constable vs. The National Steamship Company⁶ concerning the respective rights of parties to a bill of lading, under somewhat extraordinary conditions. In 1894, he argued for the appellants the very important case of Hilton vs. Guyot,⁷ which involved the effect of a foreign judgment and, incidentally, of international law, foreign law and reciprocity. After a three days' argument, the case was afterwards ordered for reargument, and only decided after more than a year's deliberation and then by a five to four vote. Later in the same year he argued for the appellant the case of The Bate Refrigerating Company vs.

⁴ 143 United States Reports, 110.

⁵ 148 United States Reports, 301.

⁶ 154 United States Reports, 51.

⁷ 159 United States Reports, 113.

Sulzberger,⁸ which determined the question of the life of a valuable patent as affected by the termination of a foreign patent and the meaning of the act of Congress with reference thereto. In 1895, he participated in the argument of the celebrated income tax cases,⁹ which will be later mentioned more particularly. In 1896, he argued for the appellees, the case of *United States vs. Trans-Missouri Freight Association*,¹⁰ and about a year later the case of *United States vs. Joint Traffic Association*,¹¹ involving the legality of traffic and rate agreements between railroads, and the application of the interstate commerce laws of Congress. In 1896, he argued, and a year later reargued, for the appellees the case of *Smyth vs. Ames*,¹² which defined, limited and applied the power of a state to control railroad rates; and in 1898 argued for the plaintiff in error the case of *North American Commercial Company vs. United States*,¹³ involving the rights under the government lease of the seal fisheries.

This record, which is not, nor intended to be, complete of Mr. Carter's work in the highest court, from the sixty-first to the seventy-first years of his life, and an examination of his briefs, many of which are

⁸ 157 United States Reports, 1.

⁹ 157 United States Reports, 429; and 158 United States Reports, 601.

¹⁰ 166 United States Reports, 290.

¹¹ 171 United States Reports, 505.

¹² 169 United States Reports, 466.

¹³ 171 United States Reports, 110.

the argument for the United States, which he did in a speech occupying seven days. The first two days of this argument were devoted to a review of the development of the controversy, and of the history of the Behring Sea neighborhood under Russian and American rule for upwards of a hundred years; the next two days were occupied with a discussion of the principles of international law, the freedom of the seas, the discovery of the seals, the early Russian regulations and the Russian ukase and international correspondence thereon in 1821-1824; the fifth and sixth days were occupied with the consideration of the foundations and development of the law of property, and incidentally of property in animals; the nature and habits of the fur-bearing seal; and of the different methods of seal taking; and the seventh day's argument treated of the alleged wrong of pelagic sealing and the rightfulness of the correction of that wrong by the methods adopted by the United States government; and of the regulations to be imposed upon seal taking by the Commission should the right of property in the seals not be sustained.

This mere indication of the lines of the argument will show its vast compass and the extent of its foundations. It exhibits Mr. Carter's characteristics of thoroughness and completeness in preparation, and clearness and force in composition and expression. It is impressive throughout, but nowhere is so great a height reached as at the close of the second day's argument, where he said:

This is called an *arbitration*; but very plainly it is not an arbitration of that character which very frequently takes place between man and man. Oftentimes in controversies between individuals it is of far higher importance that the particular dispute should be in some manner settled and the parties left at peace, than *how* it shall be settled; and therefore in such cases the decision is often reached by some reciprocal process of concession giving a little on one side and conceding a little on the other, and so on, until finally an agreement is reached without a resort to any particular principle. That is not the way to deal with this controversy. It is of a totally different character. If it could have been disposed of by mutual compromise and concession it would never have been brought to this arbitration. The parties themselves could have settled it. They are quite competent to say how much they will be willing to yield, in order, by mutual compromise and concession, to finally reach a point upon which they can agree. But the difficulty in this case is that the parties were in difference in respect to their *rights*, and they never could come to an agreement upon them. They differed as to the question of the powers a nation may exercise upon the high seas in defense of its admitted rights of property in time of peace. They differed on the question whether the United States has a property interest in these seals, and in the industry which has been carried on in respect to them on the Pribilof Islands. These differences they have never been able to reconcile. At variance with each other in respect to them at the start, subsequent discussion between the two parties has had the effect only of more widely separating them; and it is that controversy upon those questions of right which they have committed to your decision.

The constitution of this Tribunal also imports that the questions are those of *rights*. Why should a tribunal have been called together constituted of eminent jurists from several distinct nations unless it was intended that the rules of right should be applied? Why should provision have been made for counsel supposed to be learned in the law, and learned in the fundamental

When I say that the rule must be a moral rule, that is to say, a rule dictated by the moral sense, I do not mean, of course, that it is the moral sense of any individual man, or of any individual nation, because there are differences in the moral convictions of different men and of different nations. It is a controversy between nations. We cannot apply to it the moral standard, either of one or of the other, or of any particular nation. Where, then, can we find it? I submit to you that we must find the rule in that *general moral standard* upon which all civilized nations are agreed. We cannot take the opinions of one; we cannot take the opinions of another. We must take that standard upon which all civilized nations are agreed; and that there is such a standard there can be no manner of doubt. This whole proceeding would be out of place if there were not. I could not with any propriety stand up and address an argument to this Tribunal unless there were some agreed standard between it and me to which I could appeal, and upon which I can hope to convince. There is, therefore, *an agreed standard* of morality and of right, of justice and of law, agreed upon among all civilized nations and among the people of all civilized nations. It is just as it is in municipal law. There is a standard there. When controversies are brought before a municipal tribunal, it is most generally the case that there is no particularly statutory law which governs the decisions; and it is very often, and perhaps generally, the fact that there is no particular prior decision, or precedent, which will serve as a rule of decision; and yet the courts make a decision. How are they enabled to reach it? They reach it through the exercise by the judges of their function as *judicial experts* whose business it is to ascertain the general standard of justice of their own country and to apply it to the controversies which are brought before them. The general standard of justice in a municipal society is so much of the general rules of morality and ethics as that particular society chooses to enforce upon its members. So, also, in the larger society of nations, there is a similar rule. There is a general international standard which embraces so much of the principles

of morality and ethics as the nations of the world agree shall be binding upon them. That is international law, founded upon morality, founded upon that sentiment of right and wrong implanted in the breasts of men wherever they are. It is this alone which enables them to live in society with each other; and, therefore, the rule which this Tribunal is to adopt is the *general standard of justice recognized by the nations of the world*, which I conceive to be only another term for international law.

Thus he strove against a compromise verdict; thus he sought a judicial decision of the matters in difference; and thus he applied to the field of international law, and in its forum, his own theory of jurisprudence. This long extract from the presentation of the American case by Mr. Carter has been here made because it presents a perfect example not only of his construction, method and style of argument, but also of his profound convictions of the nature and development of the law.

The only other professional employment of his later years which requires any special mention is that of the income tax cases which were argued in the spring of 1895. Before the Supreme Court of the United States in these cases Mr. Carter argued with impressive earnestness and vigor in favor of the constitutionality of the income tax law, and in favor also of the income tax itself. Seldom in the history of the Supreme Court has the argument and decision of a case been attended with so much passionate earnestness on the part of the bench as well as the bar.

Senator Edmunds, a distinguished lawyer and statesman, preceded Mr. Carter in an argument

against the law, in which he passed beyond the technical constitutional question involved, which turned only on the definition of a word, into the realm of political economy and of politics. Mr. Carter accepted the challenge, and, in a speech largely extemporaneous, he championed the cause of the tax-bearing multitude as against the tax-favored class, as it had never been championed in that tribunal. He laid bare that which he deemed the hypocritical pretense of current methods of national taxation, their injustice and burdensome results; the evil of the prodigious concentration of wealth, and the iniquity of its comparative exemption from the burdens of taxation. With the tremendous force of expression of which he was master, he impressed the convictions of his own mind and heart upon his hearers, and then after sailing upon the smoother waters of constitutional argument, he closed with this solemn adjuration:

I am not one of those who believe in what is called a latitudinary construction of the powers of Congress, and who seek to circumscribe within the narrowest limits the power of this tribunal to sit in judgment upon the validity of congressional action. Ours is a government of delegated and limited powers, and I hope the day will never come when this Court will hesitate to declare that the limit has been passed, when it is clearly convinced of the fact. But I also hope that it will forever decline the office of judgment in cases where the question does not assume a purely judicial form; and that it will especially refrain when there is mingled with the question any element of legislative discretion which cannot be separated from it. The powers of this court are limited as well as those of Congress, and those limits are already trans-

gressed when it finds itself even *considering* whether this or that view of a question of political economy, or of the wisdom of taxation, is a sound one.

These suggestions are all the more weighty and important in those controversies which, like the present, are calculated to arouse the interests, the feelings—almost the passions—of the people, form the subject of public discussion, array class against class, and become the turning points in our general elections. Upon such subjects every freeman believes that he has a right to form his own opinion, and to give effect to that opinion by his vote. Nothing could be more unwise and dangerous—nothing more foreign to the spirit of the Constitution—than an attempt to baffle and defeat a popular determination by a judgment in a law suit. When the opposing forces of sixty millions of people have become arrayed in hostile political ranks upon a question which all men feel is not a question of law, but of legislation, the only path of safety is to accept the voice of the majority as final. The American people can be trusted not to commit permanent injustice; nor has history yet recorded an instance in which governments have been destroyed by attempts of the many to lay undue burdens of taxation on the few. The teachings of history have all been in the other direction.

But if an overwhelming majority, in an effort to accomplish what it believes to be justice, finds itself suddenly arrested in its course by another majority of a body of half a dozen or more who happen to hold different opinions upon substantially the same questions, but who assume to speak with a different authority, and to utter the voice of law, the consequences can hardly fail to be disastrous to the stability of the law itself. Such a triumphant majority is likely to find its way to the accomplishment of its ends over the ruins, it may be, of any constitution or of any court. We have had some experiences in our history of the futility of attempting to convert political into judicial questions, and the result has not added to the authority of this tribunal. It is the part of wisdom for a judicial body to avoid attempts at the solu-

tion of problems which must and will be finally settled in another forum.

The vibrations of this remarkable peroration may still be felt in the opinions of the justices dissenting from the judgment of the court.

We have in this review, necessarily of the most general character, touched upon the more important features of Mr. Carter's professional career. Something remains to be said of him as a lawyer, a citizen and a man.

When engaged in a case, he spared no effort of industry to investigate the facts, and to sound the law to its depths. He was not content merely with the acquisition of enough to carry the case through. He had no use for an authority unless he investigated its foundations, historical or reasonable. He aimed at a completeness of learning, collateral as well as direct, upon each branch of the law upon which his advice was sought, or his services required. His powers of application and concentration were trained to the highest degree of efficiency. When he went into court he knew his case and believed in it. In a trial he was, if anything, too thoroughly in earnest. He was, for the time, hostile to his adversary. He regarded him as the leader of the enemy's forces. A most characteristic example of this spirit is found in a little passage in the midst of his argument before the Paris Tribunal of Arbitration. He had, after a review of the authorities, developed a certain principle of which he said:

Those are the doctrines of the municipal law everywhere agreed to. There is no dissent that I am aware of in reference to them; and being the universal doctrines of municipal law they may be taken, I apprehend, in the absence of evidence to the contrary, as being the doctrine of international law.

Sir Charles Russell: You must not assume that I agree to that. You say it is universally admitted.

Mr Carter: I do not assume that you agreed to anything.

Sir Charles Russell: I should not have interposed, but my learned friend said it was universally admitted.

Mr. Carter: I must understand a permanent exception then to that; but I cannot be very well deprived of the use of the word "general" or "universal," because it may be held not to include my learned friend. Let it be understood that I do not mean to include him. So far as my knowledge extends, those doctrines are universally acceded to.

But all such hostility evaporated and left no trace behind, at the close of every trial. The sharp interchanges between the British and American counsel did not prevent a mutual liking, respect and admiration which ripened into a close and intimate friendship that lasted until the close of Lord Russell's life.

Mr. Carter's methods of forensic oratory are not easy to describe. He once said:

It is difficult to prescribe methods by which the art of commanding attention may be acquired. I think that the first requirement is that the man should be *in earnest*—that is, that he should really believe what he says.

No one who ever heard him speak could doubt that he fulfilled this requirement. He had a deep, rich and powerful voice which was unimpaired almost to the last hour of his life; a copious vocabulary; and a

taste delicate to a nicety. His enunciation was accurate and his emphasis impressive. While in possession of a strong sense of humor, he rarely gave any rein to humor in court, and when he did, it was usually under the guise of irony. His earnestness was the predominant feature of his method of argument. His gestures were few but always gave an impression of physical power in aid of mental force. He was of medium height and strong build. Even in old age there was no sign of weakness. He had a magnificent head, and a countenance of rugged power in which sternness, sadness and benevolence struggled for ascendancy.

Although one of the busiest men in his profession, he gave much time and attention to public affairs, national, state and municipal. He never followed any party because of its name; and had no hesitation to march with that which was going nearest his way. His opinions were strong, but he was never intolerant of new light. His mind did not narrow nor his heart harden with advancing years.

He was often heard in political campaigns in New York, and he was called upon for speeches and orations for all sorts of occasions. Two of the most notable were his orations at the opening of the State Reservation at Niagara Falls in 1885 and at the University of Virginia upon Thomas Jefferson in 1898.

In 1900 he attended at Cambridge, with the class of 1850 of Harvard, to celebrate its fiftieth anni-

versary. When called upon to respond for his class he delivered an address beautiful in thought and expression. He contrasted the spirit of the times as it shone at the noon of the nineteenth century with that of its close. It is instructive to note the conclusions of such a man, upon the tendencies of his time, towards the close of a long and successful life. After sketching the characteristics and tendencies of the national life in 1850, he thus closed:

Mr. President, what has become of the spirit, the philosophy, the ideals, which held such firm control at the middle of the century? Discredited at least, if not dismissed, must be our confession. And what have we in their place? Can a calm and just answer to this question avoid the admission that our society both in thought and action is under the control of an enormous pressure of material interests which hold in disdain any appeals to the universal principles of truth and right? And these results have been reached, or are defended, not by appeals to reason, to truth, to science, or to history, but by the assertion that there are *irresistible tendencies* to which we must not only yield, but which we must support and urge forward because they are irresistible, and those who deny their rectitude and struggle against them are stigmatized as impracticable theorists, or traitors to the interests of humanity.

Against this abandonment of reason and morals, this substitution of brute force or blind fate in the place of truth and right, I utter an humble protest. I am no devotee of the past, or believer in the finality of any past solutions of human problems, either in morals or politics. It may well be that the changes in human affairs, and especially such portentous ones as are now challenging the attention of mankind, require a revision of old theories. Nations have their duties as well as individuals, which must be performed at whatever sacrifice of inconsistent opinions. This great

nation of ours undoubtedly has duties to the world as well as to itself, and these must be performed even if we have to cast away the glittering generalities of the Declaration or even Republican government itself.

But before we discard the long-accepted teachings of the past let us be sure that they have fulfilled their function and require revision. Let them stand until new ones, reached in a reverent effort to find out what is true and right have been ascertained and established; and meanwhile, let the pressure of material interests, the denunciations of politicians, and the clamors of yellow journalism be set at defiance.

I appeal to you, Mr. President, and trust that you, and your successors after you, will see to it that truth, truth in science, truth in morals, truth in politics, *truth*, when exiled from the market place, the legislative hall, the pulpit, or the rostrum, shall find a refuge and a sanctuary *here; here*, where of old an altar was consecrated to her service, where from of old she has had her arms and her chariot; *here*, where her name has for centuries stood emblazoned, where a priesthood of the great and good have for generations delivered her oracles; here let truth, liberty and justice be held in ever-increasing honor, and assert the everlasting supremacy of the moral over the material world.

At about the age of seventy, Mr. Carter retired from active practice. For the remaining seven years, he lived an active and wholesome life. Most of each year he spent in the country—in the duck shooting grounds of North Carolina and the Chesapeake—at his country house on Long Island or on the moors of Scotland. Never having married he had no household of his own, but he was happy in the society of his friends. His mental activity found play in his unremitting interest in public affairs, and in the preparation of a series of lectures upon juris-

prudence, which it was designed should be delivered at Harvard University in the spring of 1905. They were completed within a month of his death, but not delivered.

He died, after a few days' illness, on February 14th, 1905, with his mighty mind unclouded to the very hour of his death. His life and character cannot be better summed up than by the use of the beautiful phrases which he had applied more than twenty years before, upon the death of the leader of the bar of the preceding generation:

He was the greatest lawyer of his time. He never carried his soul to the public treasury and said "What will you give me for this?" He never sold the warm and honorable motives of his youth and manhood for an annual sum of money and an office. He never took a price for public liberty and public happiness. He never touched the political Aceldama, and signed the devil's bond for cursing to-morrow what he has blessed to-day. Through a long career he cast honor upon his honorable profession and sought dignity, not from the ermine or the mace, but from a straight path and a spotless life.

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GEORGE HARDING.

1827-1902.

BY

ALBERT HENRY WALKER,

of the New York Bar.

GEORGE HARDING was born in Philadelphia, Pennsylvania, October 26th, 1827; the son of Jesper Harding, who was the owner and publisher of the Philadelphia Inquirer. Many biographers of distinguished men, devote much time and labor to ascertaining and recording the events of the undistinguished parts of the lives of their subjects. They do not appear to realize, that no reader can ever read all the important biography and history which has been written; and that the commonplace conduct of a man, before he grows great, is no more valuable to know, than similar conduct of men who never grow great at all. The biographers who are most oblivious of these truths, are those who have littered the libraries with their accounts of the early life of Lincoln. While he lived, he discouraged all their investigations and writings, and said that the record of his early life would be but a copy of part of "the short and simple annals of the

lor Walworth of New York, a commissioner of the court, to take testimony and to report his conclusion thereon. Chancellor Walworth did that duty with uncommon zeal and ability. He visited the eastern cities and examined their boats. He listened to the testimony of learned professors called by the respective parties; one professor occupying six days. He examined the most intelligent practical experts which the east could produce. He visited the cities of the west; and examined scientific and practical experts in all the large towns on the Ohio. And he traversed the river from Pittsburg to Louisville, and examined the boilers, engines and flues of the boats on which he traveled. Thus this great equity judge, after his compulsory retirement from the headship of the equity bench of New York, on account of having passed the constitutional limit of age, toiled month after month, as the commissioner of the court in Pennsylvania, in the work of ascertaining the comparative merits of high chimneys and low chimneys for steamboats.

The leading counsel for the complainant was Edwin M. Stanton, then a Pittsburg lawyer; but the question of the necessity or non-necessity of a high chimney on a steamboat, was a technical question in the sciences of combustion and pneumatics, with which Mr. Stanton was not competent to deal, without assistance from a lawyer more learned in those sciences. Mr. Harding was therefore retained to render his assistance. To that end, Mr. Harding

attended the commissioner during much if not all of the time of his journeys and investigations. Those investigations resulted in a report favorable to the complainant. That report took the ground that the high chimneys were necessary, to running the steam-boats by natural draft, and that natural draft was necessary for those boats; because forced draft from mechanical blowers would be unduly expensive, and would be rapidly ruinous to the boilers.

When the case reached the Supreme Court of the United States, Mr. Harding filed in that tribunal a printed argument in support of the decision of the commissioner, at least one copy of which argument is still in existence. It occupies only sixteen printed pages, but it is an explanation of the subject which would do credit to any man, and was a remarkable production to come from a young lawyer of twenty-four.

The first great patent litigation with which Mr. Harding was connected as counsel, was the most celebrated litigation with which he was ever connected. It was the Morse telegraph litigation. His first argument in that litigation was delivered in Philadelphia, about the beginning of 1853, before Justice Grier, and the district judge for the Eastern District of Pennsylvania, sitting together as the United States Circuit Court for that district. His original employment on the side of Morse in that case, did not contemplate his taking any part in the oral argument; the honors of that business being

reserved for the older counsel for the complainant. But as one of those gentlemen was proceeding to open the case, he found it necessary to turn from time to time to Mr. Harding for materials with which to answer questions from the bench. Justice Grier endured this for awhile, but only for awhile. He soon said, "Let that young man stand up and explain this case to the Court." Thereupon Mr. Harding bowed to the judicial requirement, and began the desired explanation, and did not stop it, till the whole case of Morse was properly presented to the judges on the bench.

Justice Grier, in due time, delivered the opinion of both judges, in favor of Morse on all the eight claims of his patent. But that Philadelphia case never reached the Supreme Court, because it was outrun on the way to that tribunal, by the case of *O'Reilly vs. Morse*,² which had been decided in favor of Morse in 1849, by Judge Monroe, holding the United States Circuit Court for the District of Kentucky. The *O'Reilly* case was appealed by the defendant to the Supreme Court, and was due to be argued in that tribunal in December, 1853, by Mr. Campbell of Philadelphia, and Mr. George Gifford of New York on behalf of the patent. Justice Grier being apprised of this prospect, and having been impressed by Mr. Harding's argument, ventured to suggest to Morse that he also employ Mr. Harding to take part in the argument, for it appeared to

² 15 Howard's Reports, 62 (1853).

Justice Grier that Mr. Harding understood the Morse patent better than anybody else.

Of course that kind judicial advice was adopted, and thus when the case was called in December, 1853, Mr. Campbell and Mr. Gifford and Mr. Harding confronted the defendants' counsel, General Gillet and Senator Salmon P. Chase. The winter of 1853 and 1854 was momentous in Washington. During that time Senator Douglas, called on President Pierce one evening or one Sunday, and lightly proposed to repeal the Missouri Compromise; and Mr. Pierce was so pleased with the suggestion that he at once agreed thereto. And before Congress adjourned that session, the audacious result was accomplished by the Kansas-Nebraska Act of 1854. But neither Pierce nor Douglas knew what he was doing. As lightly as two school boys might rob an orchard, they were plunging the nation into a political conflict that did not end and could not end, except eleven years later with the end of the Civil War. It was when this black cloud was lowering that Senator Chase stepped from the old senate chamber, which is now the Supreme Court room, to the then Supreme Court room in the basement of the Capitol immediately below; and measured his powers with those of young Harding, in debating the most celebrated patent case which has ever yet been argued in any court in the world.

But celebrated as was and is, the case of *O'Reilly vs. Morse*, the Morse telegraph was not a difficult

invention to make, as compared with some others of recent times. When Morse conceived his invention in 1832, a better telegraph than his should have been within the reach of any true inventor, who knew all about the chemical electrical generator or battery of Volta of 1800, and all about the laws of insulation which had been discovered by Gray in 1729, and all about the electro-magnet which had been invented and made and used by Joseph Henry in 1831. Indeed, Professor Henry had used these three elements to ring a bell at a distant place by a voltaic current, by making and breaking that current at a point at hand, before ever Morse gave any attention to the topic. Still Morse conceived a telegraph in 1832, and obtained a patent on it in 1840, and obtained a reissue of that patent in 1846, and a reissue of that reissue in 1848. The case of O'Reilly vs. Morse was based on the reissue of 1848. That reissue patent had eight claims and the difficulties of the case grew mainly out of the needless faults of the patent, rather than out of the nature of the subjects with which the patent purported to deal. None of the first seven claims of the patent had any permanent value. Some of them had been infringed by O'Reilly, but nobody would be found to be infringing any of them now, if the Morse patent were still in force.

The great question in the case of O'Reilly vs. Morse, was the question of the validity of claim 8, and that question was decided in the negative by the vote of five justices, against three dissenters, when

the bench was occupied by only eight. This decision was a substantial defeat for Morse, and for the side of Harding. But Harding was not even partly responsible for that defeat, for he did not agree with the two older counsel of Morse on the question of the proper interpretation of claim 8; and the validity of that claim depended on its interpretation.

Campbell and Gifford held that the claim meant "the use of an electric current for marking signs at any distance." Harding held that the claim meant, "the process of alternately making and breaking an electric circuit at a near place, and thereby alternately magnetizing and demagnetizing, an electromagnet, at a distant place, and thereby so moving an armature at that distant place, as to cause it to mark signs on any suitable material there." And Harding also held that the interpretation of Campbell and Gifford, if adopted by the court, would be fatal to the claim; because it would transform it into a claim for a single "principle" or law of nature, which he held to be not a subject of a patent under the Acts of Congress. The language of the claim was so verbose, that it was difficult to place either of these interpretations on it, or indeed to place upon it any definite interpretation whatever. Still if Mr. Harding had been permitted to present his interpretation unhindered to the court, the latter would probably have adopted it, and thereupon would doubtless have sustained the validity of the claim.

But Campbell and Gifford overruled their young junior, and insisted on trying to get the court to interpret the claim as being broad enough to cover the use of an electric current for marking signs at any distance. They therefore presented that to the court, as the view of the complainant, and they confined Harding's permitted argument to the other questions in the case. The result was as Harding foresaw. The court construed the claims as covering the electric current, when used to mark signs at any distance, and having thus construed it, the court held it to be void, as being for a single principle, or law of nature. It was thus that the rule of law which Harding found potentially involved in the statute, was expressly adjudicated by the Supreme Court, and the case of *O'Reilly vs. Morse* afterward became celebrated, as the leading case in the patent laws of the United States on that subject. Harding foresaw that decision, but he did nothing to produce it; and he was not allowed by his senior counsel to avert its rendition, by excluding the question from the case, as he would conservatively have done, if permitted.

The first elaborate patent case Mr. Harding conducted alone, was *Child vs. Wilson*, which he brought in Philadelphia, as complainant's counsel, near the beginning of the last half of the nineteenth century, for infringement of a patent granted to John S. Mini, August 24th, 1852, for a process of making lamp-black. Mr. Harding began taking the complainant's evidence on Thursday, July 28th, 1853,

and closed his *prima facie* case only six days later, though an adjournment covered four of the intervening days. He introduced his documentary evidence on Thursday, and took the testimony of all his ten witnesses on Tuesday and Wednesday.

The record of his work during those three days, indicates that he was already a technically correct and commendably concise practitioner. Thus, where he had to prove the title of the complainant Child, to the Mini patent, he did not offer in evidence a certified copy of the Patent Office record of that assignment. On the contrary, he anticipated by forty years, the present decisions of the courts, that the statute which other lawyers long supposed to make such a certified copy evidence of the original assignment, does not bear that construction, or have that effect. And when he undertook to prove the genuineness of the original assignment he did not do so in the incorrect and ineffective way of ignoring the subscribing witness and taking testimony to prove the assignor's signature. On the contrary, he produced the subscribing witness, and first proved his signature by him, and then proved by him, that the assignor named in the assignment did execute that document. So also, in taking the testimony of his ten witnesses, he proceeded with precision, to the very points to be proved, and did not stuff the record with any irrelevant matter.

The good beginning which he made in this case, was followed by an elaborate litigation, involving the

sciences of combustion and pneumatics, and showing in its progress, the full ability of Mr. Harding at the early age of twenty-five or twenty-six, to conduct an abstruse patent case with dignity and efficiency, and without guidance or assistance from other counsel.

The fourth great case in which Mr. Harding was engaged was the reaper case, in which he was junior counsel with Edwin M. Stanton and Abraham Lincoln in 1855. That case was originally named McCormick vs. Manny, but when it reached the Supreme Court in 1857, Manny had died, and the case was thereafter known as McCormick vs. Talcott.³

The bill was not based on McCormick's original reaper patent of 1834, but on claims 4 and 5, of his patent of 1845, and upon claim 2 of his reissue patent of 1853. These claims referred to the divider, the reel post, and the raker's seat, respectively, of a grain-reaping machine. There was no occasion for any exercise in the case of any uncommon scientific knowledge, or power of mechanical insight or analysis; but so large business interests were involved in the litigation, that Edwin M. Stanton, Abraham Lincoln and George Harding were all retained to defend it for Manny, against Reverdy Johnson and Edward N. Dickerson for McCormick.

The case was pending in 1855, in the United States Circuit Court in Chicago, of which Thomas Drummond was then the local judge; and Justice McLean

³ 20 Howard's Reports, 402 (1857).

of Ohio was the presiding justice. The case was so important that Justice McLean consented to sit with Judge Drummond to hear it; and the parties consented to argue it in Cincinnati, instead of in Chicago, in order to save Justice McLean a journey to Chicago from his home in Cincinnati.

It was in September, 1855, that Abraham Lincoln, a lawyer of Springfield, Illinois, first met Edwin M. Stanton, a lawyer of Pittsburg, Pennsylvania, and that first meeting occurred in the Burnett House in Cincinnati, when Lincoln and Stanton and Harding met for consultation, prior to going into court to argue the case. The testimony had all been taken and printed by Dickerson and Harding, without the agency of either Johnson or Lincoln or Stanton; but each of them had received copies of the entire printed record at their homes, some weeks before the argument. Lincoln had examined the whole of that record, and had laboriously written out an argument for the defendants, which he expected to read or summarize to the court at the hearing. This paper was delivered by him to Harding beforehand for review and possible criticism; but Harding did not think it likely to contain any valuable contribution to the case, and therefore simply put it aside unread. Indeed Mr. Lincoln made a very unfavorable impression on both Stanton and Harding throughout the time of their association in the case in Cincinnati. Harding was too courteous to show more of his feeling, than might be inferred from neglect of Lin-

printed brief before Judges McLean and Drummond; and its intellectual origin is thus traceable to Mr. Harding, in the twenty-eighth year of his age.

In 1856 the Committee on Exhibitions, of the Franklin Institute, invited Mr. Harding to deliver the address at the close of the twenty-second exhibition of American manufactures, which was held in that year under the auspices of the Institute. The address which he delivered in pursuance of this invitation was fortunately printed and preserved.

It contains about six thousand words and occupied nearly an hour in its delivery. Its principal aim was to show that the advancement of invention and manufactures is dependent upon an intimate union between Science and Art. His argument to that end was mainly historical, in comprising a review of pre-Baconian times, when philosophy was deductive and was disdainful of experiment; followed by a review of the two centuries which had followed the death of Bacon, in which centuries philosophy had begun to sit up and take inductive notice of actual facts. Among the men who had been distinguished inventors, during those centuries, he awarded the first place to James Watt, saying that he had thus far contributed beyond all other men to the lasting comfort, happiness, and glory of his race. In this connection, he pronounced one sentence of decided historical significance; saying that "Above the wreck of electro-magnetic, and hot air engines, the fame of James Watt, in undiminished splendor, towers

proudly eminent." This was a natural burst of eulogy for any orator to take in 1856; and as to hot air engines is still applicable. But as to electro-magnetic engines, the passage is archaic now. When it was uttered, the law of nature by which the electro-magnetic dynamo runs and works, had been discovered by Faraday, more than twenty years before, and he had foretold that the art of other men would some time join with the science which he had made known, and would produce an electro-magnetic generator of electricity.

And not far from the time when Harding was delivering that address, that junction of science and art actually occurred in Denmark; and Hjorth of Copenhagen, recorded the splendid result in his British patent for the first electro-magnetic dynamo known to history. But Hjorth was not famous, and his dynamo patent was unappreciated and unknown, till long after the electro-magnetic dynamo was independently reinvented in 1866, by Wheatstone in England, and by Siemens in Germany.

The day of the steam engine began with Watt in 1769, and the day of the dynamo potentially dawned in 1855, and actually began in 1866. The steam engine remains to do its old work, and also sometimes to run the dynamo; but the dynamo can work with water power, and without any steam engine, wherever rivers fall or tides may ebb and flow; and even where it is still operated by steam, it does multiform works, which the steam engine alone could never do.

And so saying, the Honorable Court duly adjourned.

The case of *Burr vs. Duryee* was decided by the Supreme Court in 1864.⁴ That case originated in the United States Circuit Court for New Jersey in 1860, the bill being signed by Joseph P. Bradley, as solicitor for the complainant, and the answer being signed by Cortlandt Parker as solicitor for the defendant.⁵ When the time came to take evidence in the case George Gifford, then the leading patent lawyer in New York, was employed to attend thereto for the complainant; and George Harding, who had now reached the headship of the patent law bar in Philadelphia, was likewise employed by the defendants. These gentlemen took a large volume of evidence, and the case was afterward decided for the defendants, and was thereupon taken by the complainant to the Supreme Court on an appeal. The printed argument for the defendants in the Supreme Court was signed by Mr. Harding alone, though Mr. Parker participated in the oral presentation of the case to the court.

That printed argument was a model of what such a production should be. The case related to the art

⁴ 1 Wallace's Reports, 531 (1864).

⁵ Those eminent lawyers were then members of the Newark Bar. Ten years afterward, Mr. Bradley became one of the justices of the Supreme Court of the United States, and continued to adorn that bench for more than twenty years, till his death in 1892. (It is with regret that the editor records the death of Mr. Parker, which occurred shortly after this essay was written.—Ed.).

of felting, as applied to the making of felt hats of fur or wool. Mr. Harding began by a brief "Statement of the Case," giving the names of the parties and the patents, and stating the defenses interposed, and how they would be supported in the body of the argument. Thereupon the argument proceeded to set out the history of the art of felting, with learning so curious, and in a style so excellent, that the pages must charm every reader who reads them. The paragraphs began as follows:

The fact that when fibers of wool or fur are moistened and rubbed together, they would interweave spontaneously and form the fabric called felt, has been known from a remote antiquity. The process of felting is believed to have been anterior to the art of weaving.

In Asia felted wool was used at a very early day for making tents, cushions, and carpets. It was known to the Greeks as early as the age of Homer, and is mentioned by him, and also by Xenophon and Herodotus. Its use was introduced into Rome from the Greeks, and it is mentioned by Pliny. The principal use of felting among the Greeks and Romans, was the making of a covering for the head of the male sex, which was generally a sort of skull-cap, fitting closely to the head, and it was somewhat used for lining shields and helmets, and representations of this are found on many old coins and statues. Felt hat-makers appeared in France, in Nuremberg and in Bavaria, early in the fourteenth century.

I thus allude to the antiquity of the process of felting, with a view to call your attention to the curious circumstance that the discovery of the true cause of felting is of very recent date. Why the fibers of fur and wool should felt, or spontaneously interweave, when moistened and rubbed (a property which no vegetable fiber possesses) was never satisfactorily demonstrated until about the year

1835. It had been conjectured by Monge, a French savant, in 1790, that felting was probably due to small scales on the fibers of fur or wool; but, as nothing of the kind was found by the aid of the microscope, the idea was ridiculed by Dr. Young and other philosophers, who contended that the felting of wool or fur fibers was due simply to the attraction of adhesion, the same principle by which the two halves of a leaden ball adhere together. Mr. Youatt, an intelligent English naturalist, in 1835, in investigating the subject of felting, carefully re-examined the fibers of wool, and the fur of rabbits and other animals, under a powerful achromatic microscope, and found that each fiber of fur or wool has its surface covered with serrations or saw-like projections, and that all these serrations pointed in a direction from the root towards the point of the hair.

Mr. Harding not only presented the defendant's case on paper in this clear style, but he also sought and obtained permission from the court, to bring into the court room a large museum of exhibits of machines and apparatus, with which he performed before the bench of justices, the whole business of making felt hat bodies, including disintegrating the fur, and throwing it through the air, upon a perforated cone, and causing it to cling by suction to the exterior thereof, and then producing incipient felting of the fur while still clinging to the cone, and finally completing that felting, so as to produce a coherent and sufficiently strong felt hat body. The justices of the Supreme Court greatly admired and enjoyed Mr. Harding's presentation of this case to them, and unanimously decided the case in his favor.

The relevant rules of the patent law as now developed, are so well known and are now so old, that a

patent lawyer of to-day is inclined to wonder why Mr. Harding used so much energy to accomplish so apparently easy a result, as the winning of the case of *Burr vs. Duryee*. But those rules, though inherent in the patent statutes, had not then been fully apprehended by the Supreme Court. The main issue involved in the case was the patentability or non-patentability of the mode of operation of a purely mechanical apparatus or machine. The complainant's counsel had to affirm, and Mr. Harding had to deny such patentability, in order to present any strong argument for the respective parties.

That issue had apparently been involved in the case of *Winans vs. Denmead*,⁶ which had been decided by the Supreme Court in 1853. When that case was argued, two young justices of great ability had lately come upon the bench. These were Justices Curtis of Massachusetts and Campbell of Alabama. Justice Curtis delivered the opinion of five justices, in terms which were construable as affirming the patentability of the mode of operation of a mechanical apparatus. Justice Campbell delivered the opinion of four justices vigorously controverting the opinion of Justice Curtis, and the consequent conclusion of the court.

The development of the science of the patent law which has occurred since 1853, has logically established the unsoundness of the opinion of the five justices, and the soundness of the opinion of the four

⁶15 Howard's Reports, 330 (1853).

dissenting justices in the case of *Winans vs. Denmead*; but that evolution had not occurred when the case of *Burr vs. Duryee* was argued in 1864. In that argument, the complainant's counsel staked their case on *Winans vs. Denmead*, and formulated seven doctrines which they claimed to be deducible therefrom; and all of which together amounted to saying that it is the mode of operation of a machine, and not the machine itself that is patentable. Mr. Harding did not attempt to contend that this doctrine was not the doctrine of *Winans vs. Denmead*, for it apparently was. He ignored *Winans vs. Denmead*, and argued his case on its merits, just as if the decision of the majority of the court in that case had never been rendered. This was characteristically tactful in Mr. Harding. Avowedly to controvert that decision, would have displeased the three justices who still remained on the bench, of the five who had rendered it. To appear to ignore that decision, while furnishing arguments which were fatal to its supposed correctness, was to give each of those three justices an acceptable chance to vote in favor of the opposite and the correct view of the minority in *Winans vs. Denmead*. And such was the result attained by the management of Mr. Harding. Indeed Justice Grier, who was one of the three, was the very justice who delivered the unanimous opinion of the court in *Burr vs. Duryee*; and that opinion, though not formally overruling *Winans vs. Denmead*, did speak of what is really the doctrine of that case, in tones that it is

difficult to distinguish from tones of contempt. The result on the further evolution of the patent laws was salutary indeed, for if the notion that the mode of operation of a machine, is patentable, had been affirmed in the case of *Burr vs. Duryee*, the patent laws of this country would have been so far vitiated by strange doctrine, as to make them unworkable in many cases, and unjust in many others. The legal influence of Mr. Harding was therefore highly important and beneficial, on this occasion, for it was exerted to upset the unsound decision of the five justices in *Winans vs. Denmead*.

In passing, it is curious to be told, as the reader is now about to be informed, that that decision was contrary to what two of those justices had previously held in other cases, and to what two more of them afterward concurred in deciding. The only one of the five, whose whole judicial record was consistent with that decision, was the justice who wrote it, and even he practically repudiated it, after he returned to the bar, and when he came to argue the case of *Turrill vs. Railroad Company*.

Justices Curtis and Campbell measured their intellectual spears together, in *Winans vs. Denmead*. Voting with Curtis were Justices McLean, Wayne, Nelson, and Grier. Voting with Campbell were Chief-Justice Taney and Justices Catron and Daniel. It was a division of the court on *Mason and Dixon's* line, except that Justice Wayne of Georgia voted with the four northern justices, instead of with his four

southern brethren. Curtis and Campbell both resigned a few years later—Curtis to attain fame and wealth at the northern bar, and Campbell to join the South in the Civil War, and then to practice law. But on the issue which they debated on the Supreme bench, and which Curtis won there, in *Winans vs. Denmead*, Campbell was right and Curtis was wrong. And because he was right, Campbell's dissenting opinion has now, after many years, been substantially embodied in the case law of the United States, while the opinion of Curtis remains only to be quoted by those who do not understand how obsolete it really is.

The most elaborate and important and long-continued litigation in which Mr. Harding was ever engaged, were the *Tilghman* cases. Those cases were all based on the patent to Richard A. Tilghman of January 9th, 1854, the first term of which continued till January 9th, 1868, and the extended time of which expired January 9th, 1875.

The patent had but one claim, and it was the shortest claim ever litigated. But it was perfect. It was in the following twenty-one words:

The manufacturing of fat acids and glycerine, from fatty bodies, by the action of water, at a high temperature and pressure.

Tilghman vs. Werk was the first case which Mr. Harding brought on that patent. It was brought in the United States Circuit Court in Cincinnati in 1859. He continued thereafter to conduct suits under the *Tilghman* patent for nearly twenty-nine years,

until in March, 1888, the Supreme Court gave his client a decree for more than three hundred thousand dollars, in the case of *Tilghman vs. Proctor*.⁷ That was the longest litigation which ever occurred in the administration of the patent laws of the United States. Its prosecution by Mr. Harding was marked by nearly every element of ability which a patent lawyer can ever develop and display. But the judges did not always do their share of work with corresponding efficiency; and confessedly made one serious error, which, though Mr. Harding secured its correction at last, he secured it at an enormous cost of labor, learning and life.

The case of *Tilghman vs. Werk* came on for argument in Cincinnati in November, 1860, before Justice McLean and Judge Leavitt, sitting together. The printed argument of Mr. Harding for the complainant was an admirable summary of the case in sixteen printed pages. The questions of fact involved were chemical questions of complicated technical import, for the defendant's process differed in some respects from that described in the complainant's patent; and each had similarities and differences, as compared with each of several prior printed publications relevant to the separation of fat into its elements of glycerine and fat acids. After adequately explaining these chemical questions, and stating the evidence thereon, Mr. Harding concluded his printed argument with the following paragraph:

⁷ 125 United States Reports, 136 (1888).

We submit that the plaintiff occupies a high and meritorious position as an inventor, and that, having added to the stock of human knowledge, by the original discovery of a fact or law of nature, and having applied it to a useful object, he is entitled to the protection of the law, to secure him a moderate participation in the benefits of his discovery.

The judicial tone of this closing paragraph is characteristic of much of the written work of Mr. Harding. But the view advanced was not quite accurate; for it almost amounted to claiming the patentability, of the application, to a useful object, of the discovery of a law of nature. That doctrine was not identical with the doctrine which the Supreme Court had disaffirmed seven years before, in the case of *O'Reilly vs. Morse*; because though Morse had applied electric current to a useful object, he was not the discoverer of that fact or law.

But the ground taken by Mr. Harding was nearly the same as that which Judge W. D. Shipman disaffirmed two years later, in the *anesthesia case*.⁸ In that case, it appeared that Doctor Morton was the first and original discoverer of the power of the fumes of sulphuric ether to produce personal unconsciousness, and that he was the first to apply that law or fact in nature to prevent pain during a surgical operation. Nevertheless, Judge W. D. Shipman decided in 1862, in the case of *Morton vs. The Infirmary*, that the patent invoked by Doctor Morton was void, as being for the unpatentable application of a

⁸ *Morton vs. Infirmary*, 5 Blatchford's Reports, 116 (1862).

fact or law of nature to a useful object. And though Judge W. D. Shipman was only a District Judge, his decision in that case has stood unchallenged for more than forty years, and is now an undoubted and unquestioned authority on the point of law on which it was based.

In ending his printed argument in the case of *Tilghman vs. Werk*, Mr. Harding should have substituted the words "having utilized his discovery, by means of his new and useful process" for the words "having applied it to an useful object." With that change, he would have accurately anticipated the law on the subject of chemical process patents, as that law has been developed in the forty-five years which have elapsed since he wrote his first argument in *Tilghman vs. Werk*.

Probably, however, Mr. Harding, in his oral argument, did accurately take the correct ground on this important subject, for Judge Leavitt, when he came to deliver the opinion of the court in the case in 1862, did present the matter with technical accuracy, in saying that *Tilghman* was not entitled to a patent on the scientific fact that superheated water can decompose fat into fat acids and glycerine; but that he was entitled to such a patent as he had received, which the judge held to be a patent for a new and useful process of utilizing the discovery which *Tilghman* had made.

Soon after the decision of Judge Leavitt in 1862, Mr. Harding brought a suit on the first term of the

nically conclusive as between Tilghman and Mitchell; and it was practically conclusive as between Tilghman and everybody else, unless and until a contrary decision could be obtained from the Supreme Court between Tilghman and somebody else. The condition of the litigation at the end of fifteen years was therefore desperate indeed. But Mr. Harding showed himself to be as brave in apparently final defeat, as he had been brilliant in long-continued and unbroken victory. He immediately planned and instituted a new campaign which must, he knew, last for years, and which did in fact continue for fourteen years more, until final success crowned it, in 1888.

That new campaign began with a new suit on the Tilghman patent, against Proctor, in Cincinnati. In obedience to the decision of the Supreme Court in the Mitchell case, the court dismissed the suit. Mr. Harding thereupon appealed to the Supreme Court; and the critical point of the contest was reached when this case of *Tilghman vs. Proctor*¹⁰ came on for argument in that tribunal, in 1880. That argument was made by Mr. M. H. Carpenter and Mr. C. B. Collier for Proctor, and by Mr. Harding alone for Tilghman. It was made before a bench of seven justices, including Justices Miller and Field, who had concurred in deciding against Tilghman in the Mitchell case, and including the three who had dissented from that decision, and also in-

¹⁰ 102 United States Reports, 707 (1881).

cluding Chief-Justice Waite and Justice Harlan who had been appointed since the Mitchell case was decided. And now, to the mingled delight and disgust of Mr. Harding, the Court unanimously decided in February, 1881, that its decision in the Mitchell case was diametrically wrong. His delight was partly due to professional satisfaction at the final vindication of the views, which for twenty-one years he had been presenting to the Federal Courts, and partly to the satisfying prospect of being ultimately able to secure some money recovery for past infringements of the Tilghman patent, the extended term of which had now expired nearly six years before. His disgust was partly due to professional displeasure with Justices Miller and Field in administering to him in 1874, a bitter defeat which they now joined all the other justices in holding was erroneous and undeserved, and partly to the fact that the \$330,000, which the present correct decision showed Mitchell really owed to Tilghman, could be kept by Mitchell under the doctrine of *res judicata*, notwithstanding the unanimous decision of the Supreme Court to the effect that it belonged to Tilghman.

Of course Harding had to hold his peace, and not criticize the two justices who were confessing their error, nor Justices Clifford and Hunt who had participated in that error, and who though still living, had retired from active judicial work.

The unanimous decision of the Supreme Court in favor of Mr. Harding in the case of Tilghman vs.

of with equal speed and distance at both its ends. The cases involved no questions of law, except some questions of the law of reissues. Those questions were not much argued by Mr. Harding, for they had been decided by the Supreme Court several years before in favor of his client, on the same patents, in the case of *Seymour vs. Osborne*; ¹³ and that decision was simply reaffirmed in *Seymour vs. Morse*, Justice Clifford delivering the opinion of the Supreme Court in both instances. But in 1882, after the death of Justice Clifford, and when Justice Bradley had taken his place as the leading patent law judge on the Supreme bench, the law of reissues, which Justice Clifford had ponderously built up in the *Seymour* cases, and other litigations, was much modified by the Supreme Court, in a series of reissue decisions, beginning with the unanimous opinion of the court delivered by Justice Bradley in the case of *Miller vs. The Brass Company*, ¹⁴ and continuing as often as the same questions have arisen, from that day to this.

The *McCormick* case and the *Seymour* cases related to reapers, rather than to mowers, or to combined mowers and reapers. But Mr. Harding was also engaged for years in prosecuting suits under four *Wheeler* patents, for grain and grass harvesters combined. Two of these suits were brought by the inventor, *Cyrenus Wheeler, Jr.*, against *The Clip-*

¹³ 11 Wallace's Reports, 516 (1870).

¹⁴ 104 United States Reports, 350 (1882).

per Mower and Reaper Company¹⁵ and were argued for the complainant, by Mr. Harding before Judge Woodruff, in New York City in March, 1872.

His opening argument and his closing argument, were stenographically reported, and were afterward revised and printed in a volume of one hundred and sixty-five quarto pages, and were illustrated in that volume by numerous photolithographic copies of drawings, and by many wood-cuts of machinery. The opening argument of Mr. Harding began with an account of the prior reaping machines of Hussey and of McCormick, and continued with an account of the mowing machine of Ketchum (who was later than Hussey or McCormick, but earlier than Wheeler) and concluded with a discussion of the numerous mechanical similarities and differences which were involved in the cases. His closing argument began with a paragraph which is a fair example of the tone of clearness, dignity, strength and simplicity with which he treated moral questions in arguing patent cases. He began as follows:

In my opening argument of this case, there were two machines to which I purposely omitted to call the attention of the Court, when pointing out the history of the art, and I expected that the defendants would not have alluded to them. I will now proceed to call your attention to them; and it is with a feeling of regret that I am compelled to do so, because it will direct your honor's attention to the depravity of the human character, to a greater extent, perhaps, than in any other patent case, has yet been done.

¹⁵ 10 Blatchford's Reports, 181 (1872).

From this introduction, the closing argument of Mr. Harding swept forward with nearly thirty thousand words of exposition of oral evidence and mechanical facts, in the style of the prime of his life; which was a style superior in its kind to that of any other patent lawyer in American history.

The present memorial is necessarily too short to contain detailed accounts of any more of the litigations in which Mr. Harding was engaged during his professional life.

The whole number of his reported arguments in patent cases in the Supreme Court, was twenty-eight; and his reported arguments in the Circuit Courts, and in the Circuit Courts of Appeals of the United States, number about one hundred. The present writer has carefully examined all these reports, and has selected, for particular treatment in this memorial, the most important and noteworthy of them all; though at least twenty others would have furnished decidedly interesting and instructive materials for such a memorial, if those cases which have been mentioned and explained, had never been brought.

Among the twenty cases, one might have been the case of the Union Paper Bag Machine Co. vs. Waterbury,¹⁶ which was argued by Mr. Harding for the complainant, in the Circuit Court of Appeals for the Second Circuit in 1895. That argument was the end of Mr. Harding's work in that case; and that case had been actively litigated on both sides for

¹⁶ 70 Federal Reporter, 240 (1895).

nearly ten years, during which success had first attended one party, and then the other. At the time of the final argument of the case, Mr. Harding was sixty-eight years old. The morning and the noon of his life were far behind him, death had invaded and again invaded his family group, and his native force was naturally abating. But he was a very formidable antagonist yet, and he presented his client's case to the Court with his old clearness and his old sagacity, and with some examples of his old eloquence and his old charm.

Though Mr. Harding continued to consult, and even somewhat to act in patent cases for a year or two longer, he was compelled, by weakening arteries, to retire, before the end of 1897, from all further participation in the work of the world. Then followed five years of twilight; passed in complete retirement without loss of personality, or of memory, relieved by occasional visits from old friends, and normally occupied by philosophic calm, and mellow and charitable retrospection. He died November 17th, 1902.

Mr. Harding disclosed and used in his practice in patent cases, only a part of his potential powers; and some of those which he exhibited in that practice he exhibited but partly. Great as he was as a patent lawyer, the patent law was not the true field for his career. He should have been a general jury and equity lawyer, and afterwards a statesman; and in such a combined career, his greatness and his fame

would greatly have exceeded the magnitude which they actually attained. For his native genius included an ardor, a brilliancy and a charm, which could find no sufficient field for action, in explaining mechanical or chemical similarities and differences. Electricity would have been a more suitable subject for the work of his animated brain; but he was not permitted by his senior counsel to do his best in the telegraph case. After that litigation was ended, in 1854, when he was still in his youth; there was no great electrical litigation in the United States, till a quarter of a century later.

Gigantic controversies arose, after 1880, in the telephone cases, and in cases on electric lights, electric dynamos, electric motors, electric railroads, and electric storage batteries. But most of those cases in modern electricity required for their management, great amounts of new technical learning in abstruse subjects, which Mr. Harding was too busy and too old to acquire; and therefore he did not participate in many of the great electric litigations which occurred during the last twenty years of the nineteenth century.

During his life, he argued enough cases outside of the patent law, to show what he could do in general jurisprudence. Among these, were cases involving some important constitutional questions about bridges over the Passaic and the Schuylkill rivers; his arguments in which were highly admired by all the advocates and judges who heard them, and are

still remembered with pleasure by those of them who survive.

As a jury lawyer, he could probably have excelled both Daniel Webster and Rufus Choate; for he had an easy, happy brilliancy and grace of manner which would probably have been more effective with juries than Webster's heavy grandeur, or than Choate's impetuous declamation. As an advocate in equity cases, before chancellors and courts of appeal, he would have been even greater in some other classes of cases than he was in patent cases; for though he persuasively dealt with questions in chemistry and mechanics; he could deal more eloquently still, with questions involving human life and human relations. And as a statesman before the people on the public platform or in the senate chamber, he could perhaps have equaled and perhaps excelled the power of almost any man who has occupied both those places during the last thirty years.

Moreover, Mr. Harding might have shone in literature, if he could have devoted his lifetime to letters. He was a reader, who read extensively in the best books, and so extensively remembered what he read, that he often surprised, with the variety of his knowledge, those who heard him converse. And his conversation which was founded on his acquirements, was made brilliant by his wit, his humor, and his remarkable powers of narration.

But the life of every man of genius and of every man of talent on this planet, is less splendid than

it might have been. Shakespeare might have written more and better than he did. The cleansing work of Napoleon should have been broader and wiser than it was. Hamilton should have lived twenty years longer than he did, and should have been working his intellectual wonders till the end. And Mr. Harding shared the lot of thousands of gifted men who actually did much, but who were potentially capable of doing more.

My own acquaintance with Mr. Harding began in 1877, and my personal friendship with him continued unbroken and unmarred till the end of his life. I was his associate in several large cases, and in several other large cases I was one of his opponents at the bar. Never, in any of those cases, did I know him to do or to plan anything which departed from complete professional propriety; or to fail in any duty to his client or to the Court. Moreover, his work was not only able and suitable in its substance, but it was also admirable in manner. He was never arrogant or angry or even irritable, at any time when I saw him, either in chambers or in court. His bearing before a judge during an argument was so nearly ideal, that it never occurred to me that it might have been improved. Rather tall, uncommonly symmetrical, and exceptionally handsome in his prime, his language, his voice, his manner and his winning smile, when he spoke carried his knowledge and his reasoning, with ease and facility into the apprehension of all his hearers. His oratory

was generally conversational and clear, rather than impetuous or imperative, but on proper occasions it would rise into a more rapid fluency and a more animated glow.

The graces were combined in Mr. Harding with such extensive knowledge of patent law and of human nature, and with such merits in the management of great patent litigations, that he was the best and the greatest patent lawyer who ever lived in America.¹⁷

¹⁷ 1 Wallace's Reports, 491 (1864).

JOHN NORTON POMEROY.

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JOHN NORTON POMEROY.

1828-1885.

BY

JOHN NORTON POMEROY, JR.,

of the California Bar.

JOHN NORTON POMEROY, perhaps the most important text-book writer of the last third of the nineteenth century, was born at Rochester, New York, April 12th, 1828; died in San Francisco, California, February 15th, 1885. His father, Enos Pomeroy, (b. 1791) was one of the pioneer settlers of Rochester (1816), and one of the first lawyers to practice in western New York; for many years he was surrogate (i.e., Probate Judge) of Monroe County, in which Rochester is situated. His father's family, for six generations, lived at or near Northampton, Massachusetts. They appear to have exemplified, in a somewhat marked degree, the sturdy qualities of the New England yeomanry. Beginning with the first settler (1632) Eltweed Pomeroy, the trade of gunsmith was hereditary in the family for several generations. The name¹ with its

¹ Pronounced Pumroy. Further details as to the Pomeroy family with some curious speculations are given in an article in the "New Englander and Yale Review," September, 1889, especially at p. 171.

somewhat un-English look, has been a familiar one in the Connecticut valley and in western Massachusetts; it was one of the most frequent on the rolls of Yale College graduates before the Revolution. Professor Pomeroy's mother's family was of Connecticut origin; her forefathers were, for the most part, clergymen of the Congregational Church, members of that clerical class which comprised practically all the scholarship and the greater part of the intellectual activity of the New England colonies. Two of her great-grandfathers were President Clap of Yale, and Governor Pitkin of Connecticut. Mr. Pomeroy's ancestry were all, without exception, of English stock.

John Norton Pomeroy passed his boyhood at Rochester or in the neighboring country. He prepared for college at the Rochester Free Academy, then under the able management of Chester Dewey, D.D., LL.D., (b. 1781), one of our early scientists, who for many years had been professor of natural philosophy in Williams College. He entered Hamilton College, at Clinton, New York, in 1843, at the age of fifteen. His grandfather, Reverend Asahel Strong Norton, D.D., (1765-1853) "a modest but well-read scholar," was still living at Clinton, where he had been pastor of the Presbyterian Church for forty years. In college, Mr. Pomeroy was a member of the Sigma Phi fraternity. One of his classmates, and a life-long friend, was the late Senator Hawley, of Connecticut. Leaving college a short

time before the graduation of his class, he taught for some months in the Rochester Academy. Thereafter, for the space of three years, he had charge of the academy at Lebanon, Ohio, near Cincinnati. During these years he began the study of law in the office of Senator Thomas Corwin, then at the height of his brilliant oratorical and legal fame, and soon to become Secretary of the Treasury. Returning to Rochester, he entered the office of Henry R. Selden,² afterwards Judge of the New York Court of Appeals (1862-64); was admitted to the bar in 1851, and practiced in Rochester until 1861. He married (1855) Miss Ann Rebecca Carter, of Savannah, Georgia, who had been one of his pupils.

Rochester, in the first half of the century, was the most important town of western New York—the manufacturing center of what was then the richest wheat producing valley on the continent. Its people were almost exclusively of New England birth or origin, not more than one generation removed. In appearance it suggested—and the suggestion still lingers in the older part of the city—a transplanted Hartford or New Haven—the deeply-shaded streets, the brick sidewalks, the generous lawns, the dignified, semi-classic architecture. The resemblance was not superficial. Its social life, in the 50's, was

² "His intellect had that peculiar integrity which would not permit him to maintain as counsel any legal position which he did not thoroughly believe as a lawyer;" 1 *Pomeroy's Equity Jurisprudence*, par. 260, n. 1, quoting from a brief of Mr. Selden's as a high authority. The observation is equally true of Mr. Pomeroy himself.

marked by an intellectual activity that was somewhat unusual in a place remote from important academic influences; in all phases of which Mr. Pomeroy was distinctly the leader, among the younger men. The focus of this activity came to be a literary club (which has recently passed its fiftieth year of continuous life) of which he was the first new member chosen by its founders, all older men. Among its other early members were Lewis H. Morgan, the ethnologist, whose profound investigations contributed more than those of any other American scholar to the comprehension of Indian society and other primitive civilizations; the venerable Doctor Chester Dewey; President Martin B. Anderson of the University of Rochester, who combined a force and vehemence of character with an equally astonishing versatility of talents; Professor Kendrick, a distinguished Grecian, and compiler of one of the best anthologies in the English language, fine representative of a generous type of classical scholarship now almost extinct; Professor John H. Raymond, afterwards the first president of Vassar College; Professor E. G. Robinson, afterwards president of Brown; Judges Henry R. Selden and Danforth of the New York Court of Appeals; and several lawyers, physicians, and business men of more than local reputation. All of these gentlemen, while eminent in their specialties or professions, were men of the broadest intellectual interests and sympathies—the best of critics of one another's work. The German

ideals of scholarship had, at that time, not yet dominated our academic life, or displaced the English and native American ideal; nowhere, it would seem, was the latter more admirably illustrated than in "The Club" of Rochester. The discussions of this club, and his thirty years of intimate friendship with this group of broad-minded scholars, undoubtedly were a formative influence of the utmost importance in Mr. Pomeroy's intellectual growth, and in the development of those liberal traits which are so distinctive in all his professional writing.

In 1861 Mr. Pomeroy sought to improve his professional fortunes by removing to New York City. The times were not propitious for such a venture; and he was again obliged to resort to school-teaching for a livelihood. For the four years following he was the principal of the Academy at Kingston, New York, the oldest in the state. During these years he wrote his first, and in point of literary style and finish, his best book, "Introduction to the Study of Municipal Law" (1864). This was designed chiefly as a text-book in schools and colleges, and for the general reader; in a less degree for the professional student, as a preliminary to, rather than a substitute for, the study of Blackstone and Kent. It treated, first, of the means by which the law develops, under our system,—the respective functions of statutes and of judicial decisions; second, in a very readable manner, founded on a substantial, though not exhaustive acquaintance with the best English and German ju-

ristic scholarship of the times, of the historic sources of our law,—of the early English laws and institutions, of the feudal system, of the maritime codes of the middle ages, and somewhat fully, of the history of Roman law; third, in brief outline, for the general reader rather than for the student, of the fundamental principles of modern American law. The book was very warmly welcomed by such lawyers and educators as Judge Sharswood, Judge I. F. Redfield, Professor Parsons, Professor Theo. W. Dwight, Doctor Francis Lieber, President Woolsey of Yale, and above all, Mr. Horace Binney; was either adopted or very favorably considered by the faculties of Princeton, Harvard, Yale and other colleges; and had long notices in legal and general periodicals. All spoke enthusiastically of its literary merits,³ while its professional critics were much im-

³ The New York Evening Post said, in the course of a long review, "The author's style is exquisitely pure, and in its marked contrast with much of what is called elegant literature in our day, reminds one of the chaste simplicity of Addison." The North American Review (July, 1864) with more discriminating enthusiasm said: "We should be inclined to employ superlatives with reference to the book before us, if there were the opportunity of using comparatives in speaking of it. But we believe that it has the distinction of being the only book of its kind. This book comprises what every educated man ought to know. . . . A book of this kind should have peculiar merits of style. As to the first merit, perspicuity, Mr. Pomeroy is faultless. This perspicuity is effected, too, without sacrifice of the next merit, conciseness. Indeed, it is the marvel of the book, that such a multitude of things can, without confusion or obscurity, be stowed in so limited a space." Mr. E. P. Smith, an eminent lawyer and diplomat, reporter of the New York Court of Appeals, writes of its having "the charm of a flowing, graceful rhetoric. It is a book that one could read aloud, of an evening, to his wife and children with good hope of their listening to it.

pressed with its thoughtful treatment of such topics as codification,⁴ legislation relating to married women, and the question, then one of burning interest, of the war powers of the President under the Constitution. What pleased the young author most was a long private letter of judicious praise from the venerable Horace Binney,⁵ for two generations the

Practically, if a man cannot do this with a book, he will not read it himself. He may study it, as he would (if he has zeal enough) the *Mechanique Celeste*, and get the perfection of truth condensed into the driest of Algebraic formulas — But in this stage of the world, we must be allured into reading, and I congratulate you upon your having made it easy and pleasant."

"A few reviews attacked his temperate treatment of this subject with a vigor and a partiality for legislative experiments that reads strangely in these disillusioned days. Not so Judge Redfield (*American Law Register*, May, 1864): "We have read large portions of the book with care, and we can say, in all sincerity, that we have never read two consecutive pages, without finding just cause for admiration, in the frank and manly declaration of sentiments, which it deeply concerns the youth of this country, to understand and thoroughly to ponder. . . . The book, both in matter and style, is almost without fault. . . . The discussion of the question long at issue between the advocates of codification and of unwritten law and judicial construction is here handled with masterly ability. It is wonderful to find so comprehensive a synopsis of all the arguments upon both sides, and the balance so fairly struck by any writer upon his first effort. The chapters upon this point deserve to be printed upon tablets and hung up in the halls of our colleges, and especially our law colleges, throughout the land. If the merits of the work were fully understood, there is not a cultivated or scholarly man in the country who could afford to dispense with it in his private library."

"Mr. Binney had written a letter to Dr. Francis Lieber of Columbia expressing his wonder that he had never before heard of Mr. Pomeroy's name in law literature,—and conjecturing, as the reason, that the author was in large legal practice. Alas for this conjecture! The blank book in which the gratified young author preserved these tributes is, in part, his classroom record as a country school-teacher!

acknowledged leader of the American bar, who said, in part:

I have read it with as much pleasure, and with as little fatigue, as some old men read a novel, myself among the number, when I can get a good one. . . . I especially admire your exhibition of the Roman law, and of its influences upon the continent of Europe, and of the gradual incorporation of many of its principles into the law of England, through the channel of the courts; and most especially the spirit in which you recommend and sustain the development and improvement of our own law, through the like channel, exposing the quackery of codification, and upholding the dignity and efficiency of the judicial office, as the best fountain of supply to the progressive demands of civilization for the security of what it seeks and obtains.

The reputation which his first book brought to Mr. Pomeroy resulted in the conferring upon him by his *alma mater* of the degree of LL.D., and his appointment (1865) to the professorship of Law in the University of New York City, to which was afterwards added the chair of Political Science in the undergraduate department. The circumstances in which he began his career as a teacher of law are thus described by one of the most brilliant of his pupils:⁶

I came to this city, and found Professor Pomeroy alone in the library of the University Law School, then a struggling institution, with but few students, a limited library, and a professor. For the two years which succeeded, the greater part of my time was passed in that library, with that professor. . . . The students were few in number; each one knew the professor personally, intimately, and was with him day by day, hour after

⁶ Mr. Elihu Root, at a meeting of the University Law School Alumni, March 5th, 1885.

hour, sometimes from the early morning until late in the evening; the whole day being occupied in the library with the professor there, the studies interspersed with occasional questions and answers, and discussions; and impromptu moot-courts coming up without any premeditation; so that we had opportunity not only to receive systematic instruction, but to know the man.

In these words we have a picture of ideal conditions in law teaching, and of an ideal method—a perpetual “conference” or *seminar*—a method, of course, not adapted to the larger classes of his later years. In his more formal work of instruction it is interesting to observe that Professor Pomeroy anticipated, by several years, most of the essentials⁷ of the method introduced into the Harvard Law School by Professor Langdell, which in late years has revolutionized the study of law in most of our larger schools. The printed “syllabus” or outline of topics, with lists of illustrative cases, and the first-hand study of these cases and their free discussion in the class room, were the important features of his system, enthusiastically appreciated by his students. At the same time, his practical sense, his clear vision of actual conditions, enabled him to avoid certain difficulties which have laid the “case system” of instruction, as pursued by its less temperate adherents, open to criticism. Firmly believing

⁷This is vouched for by Professor Slack, his successor in the Hastings Law School, who is familiar with both methods. Several features of the Harvard system, however, he considered “most preposterous,” particularly its neglect of elementary instruction for the beginner.

that the "central principle of all true education, whether professional or general" is that the student "must be taught and accustomed to acquire for himself," he was equally convinced that a three years' course of study⁸ should furnish the student with at least an elementary knowledge of all the important departments of the law, rather than with an intimate knowledge of a small range of topics. A scholar himself, he yet looked upon legal study as being, for the average student, not so much an end in itself as a means to a severely practical end. Some passages of his Inaugural Address, on taking the chair of municipal law in the University of California, in 1878, are not without timely interest:

In the first place, I most profoundly believe that the law must be studied historically. . . . But while the historical method of study is thus absolutely essential, it is one thing to study the present existing law of the United States historically, and a very different thing, under the name of the historical method, to study only the law which existed and was in full operation in England a century ago.⁹ It is absolutely astonishing—it would be incredible in any other profession—how much time of students all over this vast country is wasted every year in learning doctrines and rules of the English law which are utterly obsolete, which were always arbitrary in their nature, and do not therefore aid in understanding the law of the present day—which must be forgotten and banished from the mind as soon as learned, and which only tend to interfere with and hinder a full and accurate comprehension of

⁸ The University of California Law School was one of the very few, in 1878, to have a three years' course.

⁹ See remarks of Mr. Justice Holmes to much the same effect, *post*, p. 126.

the rules which are now in active operation and are daily administered by our courts. It is not so in any other profession.¹⁰ . . . In a word, it will be the aim of this law school to base its teaching upon the actual jurisprudence of the American states; to present to its classes living principles and doctrines which are embodied in that jurisprudence, and thus to prepare them for entering at once upon the professional life for which they are obtaining a fitting preparation.

But far more important than methods of instruction is the spirit in which it is conducted. On this the testimony of his students is abundant, and speaks with one voice. Most vivid and convincing, after a lapse of forty years, are the impressions of the high authority already quoted:

I look back at those years as being full of intellectual delight and inspiration. It was not merely that Professor Pomeroy had broad and accurate learning and a powerful and discriminating mind, capable of the most accurate analysis, and a strong sense of proportion; he had all these; but he had also an innate and overwhelming impulse, which drove him at legal questions as if they were tribal enemies; he lived and moved and had his being with them; he rioted and rejoiced among them. He experienced and exhibited the joy of conflict in this academic work to a degree I have never seen surpassed in the real battles of the bar. Into the fields of conflicting decisions, which so confuse the younger student and the older practitioner, he would lead us with amazing vigor and enthusiasm, and presently order would appear, compelled by that high intelligence in the application of fundamental

¹⁰ He illustrates by pointing out the disappearance of the conceptions of the "seisin" and the "use" from the American Law of real property, which, he says, "is based upon principles wholly foreign to those feudal dogmas which underlie the English law of real estate—principles, in fact, which have a closer affiliation with the Roman law than with the ancient common law."

principles to confused conditions, which is so well illustrated in his great work on Equity Jurisprudence. His method of working was an especially valuable example of thoroughness in the collection and testing of all necessary data before beginning to reason towards conclusions, and of breadth of view in determining what data were necessary; yet the greatest benefit came from the spirit in which he worked, which made the discussion of the dull-est subject seem the most delightful pastime.¹¹

In the course of his exacting duties at the New York University, Professor Pomeroy not only prepared many scores of elaborately written lectures—of which those on International Law were published after his death—but also wrote a treatise of some note in its day. The “Introduction to the Constitutional Law of the United States” had the misfortune of being written at the beginning (1868) instead of at the end of the most important¹² decade in the history of the Supreme Court, and has been imperfectly edited. Therefore, though it is in some respects the author’s most original and brilliant work, much of its discussion of cases soon became obsolete for the practical student; its more general part, however, is still of interest to the student of constitutional theory.¹³

¹¹ Mr. Elihu Root, in a letter to the writer, January 15th, 1906. Mr. Root said twenty-one years earlier, in the course of the remarks which have been quoted—“His power over his students was the same power that a great jury lawyer exercises over the minds of the jury.”

¹² For a justification of this adjective, if any is needed, see the sketch of Mr. Justice Field, *ante*, vol. VII, pp. 1-85.

Compare, in Rose’s Notes to the United States Reports, the space allotted to this decade and to the thirty years of Marshall’s chief-justice-ship.

¹³ It is mentioned with respect, e.g., by writers as various as Von Holst, Thayer, and Tucker.

Drawing on the definitions of continental jurists for the fundamental conceptions of "sovereignty," "state," and "government,"¹⁴ he restated in terms of scientific precision, but with readable simplicity, and fairness to other views, the "National Theory" of the Constitution—the theory that as a single state or nation¹⁵ the United States came into existence with the Revolution;¹⁶ that the Constitution is not a compact between *quasi*-independent states, but the supreme expression of the will of a sovereign pre-existing nation; and that the governments of the United States and of the individual states are on the same footing as a delegation of functions and powers by that nation.¹⁷

This work, especially in its theoretical exposition, was well received by competent critics.¹⁸ Horace

¹⁴ I.e., that sovereignty resides "in the total aggregate of persons who are members of the State" and a "government" is a necessary delegation of the function of exercising this sovereign power; Secs. 9, 37-42. Austin's definitions of these matters he repudiates most emphatically.

¹⁵ The word "State" of comparative political science is thus translated by Prof. Pomeroy, greatly to the clarification of the subject.

¹⁶ "By this theory the states did not create the Constitution and the nation, nor is the people found in existence for the first time in the Preamble,"—The Nation, June 29, 1871; Pomeroy's Constitutional Law, section 120a.

¹⁷ See section 13; and in section 28, "The powers not thus granted by the people of the United States to its general government were not reserved by the several states to themselves; for, as these states as such did not grant any powers, they could not reserve any. But they were reserved by the people of the United States to themselves, or to the several states," etc.

¹⁸ President Anderson of Rochester wrote, with intimate knowledge, of "the flood of light on the beginnings of our political order" thrown

Binney, then in his eighty-ninth year—the beloved Nestor of the American bar—wrote to the author a letter upwards of two thousand words in length, full of keen appreciation, eloquent in parts, betraying the feeling with which the great advocate had read this statement, “close, precise and demonstrative,” he calls it, “congruous with my defects,”¹⁹

by recent studies in Comparative Constitutional Law; “all of these advantages of position were possible to Professor Pomeroy, and he has availed himself of them with consummate learning and skill.” The *Nation* spoke of his “statesmanlike investigation” of the source from which the Constitution derives its authority. The *New York Evening Post* declared, of his two books, that “a thorough acquaintance with them on the part of voters and public men would do much to ennoble the politics and strengthen the free institutions of the country.”

¹⁹ No apology is needed for some extracts from this remarkable letter. “I have at length read your *Introduction to the Constitutional Law U. S.*, etc., every word of it and certain parts of it more than once. My opinion of the whole work is in brief that it is an excellent book, worthy of your character. . . . In regard to the great principle by which you regulate your interpretation of the Constitution U. S. I agree with you, have held that opinion all the days of my professional life. I believe I learned it from Hamilton, not from Marshall; though Marshall riveted the bolt which Hamilton had driven home. I walked as a grammar-school boy of our Philadelphia Academy in the first Federal Procession in this City on the 4th of July, 1788, when I think Ten States had already acceded to the Constitution, and secured it. My young heart then first felt that I had a country, without understanding the full import of the word; but afterwards the feeling carried me on the true understanding of it. . . . I have never seen the clause in the Constitution which prohibits the states from passing any laws impairing the obligation of contracts, treated more philosophically, as well as fairly and effectively, both as to right and remedy. . . .” Mr. Binney then proceeds, with great force and clearness, to express his dissent from the author’s argument (not very vital to his theory) that the states were at no time, even prior to the Constitution, separately sovereign. “I think the Union, the great merger, was a most natural, moral and necessary act, as much as an original formation of indi-

stating that which had been to him a life-long conviction. Even more flattering was a letter from Chief-Justice Chase, referring to his most recent opinion in *Texas vs. Chiles*, (one of the most carefully considered statements which the Supreme Court had ever made as to the nature of the national union and its relations to the states), and saying of it, "You have doubtless seen some traces of your thinking" in that most important judgment.²⁰

Questions of Constitutional Law continued to engage Professor Pomeroy's best thought for the rest

viduals into a society. It is no more a suicide (referring to a fanciful theory that a state, being a moral person, cannot alienate its sovereignty) than the marriage of man and woman . . . God, the Author of Reason, and the foundation of all morality, may be said to have united, fused this people, and for the very sake of their moral as well as their political existence." After a most graphic characterization of Calhoun, he concludes, "Now, my dear Sir, I have held you a long time to a rather long yarn. I had no idea of writing such a letter when I began; but I have kept spinning and spinning until I am tired, as you will be when you get, and before you get to this page. I am not, I believe, accounted garrulous with my tongue, tho' a very old man, far in my 89th year, but I shall never hereafter be able to say that of my Pen. . . . I like both your books much; but the last is rather more congruous with my defects. I like in the law what is rather close, precise and demonstrative, rather than what is large, discursive and analogical. Your two books are excellent examples of each respectively; and I have no doubt that each will have a good and wide influence on the rising young men."

²⁰ Chief Justice Chase also said, "The work in my judgment is a very valuable contribution to the study of Constitutional Law, and to the right understanding of the national Constitution. That great instrument, interpreted from time to time in reference to particular cases, by a tribunal not always composed of the same men, but always of men of various sympathies, associations, and bias, has not always received consistent construction; and a general and comprehensive view of this construction, in connection with the criticism of an independent and

of his life,²¹ though with an increasing distrust of some tendencies of the majority of the Supreme Court as shown in many of their most important decisions. At the time of his death he had projected a larger work on Constitutional Law, in several volumes, which would undoubtedly have been his *magnum opus*; with regard to this Mr. Justice Field wrote to him, a few days before his death:

Written with the ability and learning which characterize all your efforts, it would be an immense addition to the literature of the law. It would supply a great want and would be of incalculable benefit, not only to professional men, but to the public generally. . . . A work such as you would produce would place you among the great legal writers of the world.

Ill health compelled the resignation of his professorship, and in 1871 he returned to Rochester. The needs of his growing family, however, did not admit of the leisure requisite for the building up of a practice, or for extensive schemes of independent literary production. In the seven ensuing years of his matured powers, he was able to produce but a single volume of original work, his "Remedies and Remedial Rights by the Civil Action" (1876); these years were, by force of circumstances, chiefly devoted to laborious editorial tasks, with their small but prompt remuneration. He wrote nearly two

enlightened mind, cannot fail to be useful. Your book does this; but I trust it is not to be the end of your labors in this direction."

²¹ See a list of the most important of his essays, in the next note. To these should be added, as his most important work in this field, his briefs and arguments in the State Railroad Tax Cases.

hundred signed articles on legal topics for Johnson's *Encyclopædia*, of which he became an assistant editor—all of them *tours de force* of condensation, yet often spiced with his pungent originality; prepared elaborately annotated editions of "Sedgwick's Statutory and Constitutional Law" (1874) and of "Archbold's Criminal Procedure" (1877); and was a frequent contributor to the "Nation" and the American Law Review, chiefly on current topics of International Law and Diplomacy, and of Constitutional Law.²²

²² The following is a list of the more important of Prof. Pomeroy's articles in magazines: *Criminal Procedure*, North Am. Rev., April, 1861: a resumé of the essential notions underlying the English and American system of criminal procedure, with suggestions as to its improvement. *German and French Criminal Procedure*, North Am. Rev., January, 1862; discusses and explains the general nature of the criminal procedure in France and Germany, as compared with that in England and America. *Foundation of the Roman Empire*, a review of Merivale's History; North Am. Rev., January, 1865; discusses the causes which led to the foundation of the Roman Empire, the growth of Roman jurisprudence, and its influence upon subsequent legal history.

Articles on International Law and Diplomacy:—The North Eastern Fisheries: Am. Law Rev., April, 1871; The Law of Maritime Warfare as it Affects the Belligerents; North Am. Rev., April, 1872; The *Virginius Case*; Am. Law Rev., April, 1874; Codification and Reform of International Law; Am. Law Rev., January, 1875; The Laws of Warfare; Am. Law Rev., July, 1875; How Can War be Prevented? Am. Law Rev., January, 1876. Also, numerous shorter papers in the "Nation"; August 25, 1870; October 20, 1870; December 15, 1870; May 18, 1871; June 1, 1871; August 17, 1871; October 19, 1871; December 12, 1872; January 14, 1875.

Articles on Constitutional Law;

The Power of Congress to Regulate Commerce between the states; Am. Law Rev., 1878; a careful analysis of decisions up to that date. Mr. Pomeroy had little confidence in the willingness of Congress to regulate interstate railway traffic effectively, and hoped that the matter

International Law was a study to which Professor Pomeroy was strongly attracted. His formal lectures on the subject written in 1867 and 1868, were published posthumously under the editorship of Professor Theodore S. Woolsey²³ of Yale. During the early '70's Mr. Pomeroy was a frequent contributor to the *Nation* and the *American Law Review* on the questions of diplomacy that were then engaging the attention of the world. Mr. Justice Oliver Wendell Holmes, at that time editor of the *Law Review*, says: "He was my most valued contributor to the *Law Review*, and I knew him as a serious and original thinker."²⁴ Professor Pomeroy's general attitude

might be left to the legislation of the several states. The article was reprinted in pamphlet form.

The Supreme Court and State Repudiation; the Virginia and Louisiana Cases: *Am. Law Rev.*, September and October, 1883; a most vigorous attack on the decisions in these cases; it was reprinted in pamphlet form and excited much attention.

Also these papers in the "*Nation*," discussing current political questions involving constitutional construction; some of them are still of interest; "A New Political Problem," December 6, 1870 (rights of representation in Congress under the 14th Amendment); "Amnesty Measures," January 26, 1871; "The Force Bill," April 20, 1871; "Rights of Citizens," May 18, 1871; "The Supreme Court and its Theory of Nationality," June 29, 1871; "North Carolina and a New Constitution," July 20, 1871; "Is Civil Service Reform Constitutional?" August 3, 1871; "Congress and the Railways," February 5, 1874; "Appointment of Presidential Electors," December 14, 1876.

His important articles in the *West Coast Reporter*, especially that on the "Civil Code" of California, are mentioned below.

²³ Professor Woolsey wrote the final lecture of the series, to supply the place of one that was missing after Prof. Pomeroy's death.

²⁴ In a letter to the present writer, January 9, 1906. He wrote to Professor Pomeroy (August, 1881): "I need not hesitate to say to you what I have said many times behind your back, that there is

towards many of these questions was one of strong conservatism. The editor of his lectures, than whom no living American publicist is more competent to speak, thus characterizes this series of essays:²⁵

Comment upon contemporary events is necessarily very different in character from formal lectures; it is more argumentative, more fervid, with the element of prophecy as well as the basis of history, with more of the temper of the politician, with less of the restraint of the student. Nevertheless these review essays are in their way quite as able and important as the lectures, and must be studied if one would form a complete idea of the characteristics of the author.

Certain qualities are shown by both classes of writings alike, however;—a delightful felicity of language, singular directness of thought, and a logical marshaling of facts, definition of terms and classification of topics which call to mind the peculiar gifts of the best of continental publicists. But far, indeed, was he from sharing those publicists' belief, that one can introduce or alter a rule of International Law by logic alone. He scorns the professional philanthropist. He is singularly reluctant to see changes in the rules looking toward the humanization of war. He is the apostle of the *status quo*.²⁶

hardly anyone who takes part in the literature of the law in this country for whose work and abilities I have so much respect as I do for yours."

²⁵ In a letter of January 10, 1906.

²⁶ Prof. Woolsey continues:—"Robustly national in regard to our policies, he looks beyond the needs of the moment and considers our future advantage alone. Let me illustrate what I mean by recalling his attitude toward the three rules of the Treaty of 1871, called of Washington, by which Great Britain agreed that her actions as a neutral in our Civil War should be measured by the Geneva Tribunal, and which were also to govern the future relations of the two. In the Nation, May 18, 1871, he argues that Great Britain by accepting these three rules 'makes a decision by the Arbitrators in our favor absolutely certain.' This was true prophecy. But in the American Law

find themselves out of the accustomed road; with all their pride, that they trust far less to reason than to tradition; these things made it impossible at once to understand and apply the new system in its full scope and with all its logical sequences. The bar looked eagerly to the courts, the courts clung timidly to the shore; some judges were hostile, some were friendly; the best were at a loss, and we should have gained more than we could have lost, had the decisions of the first ten years never been reported. . . . How many centuries were necessary to settle the old system, we do not fully know; the new is already assuming form and comeliness, but time will elapse before there will be perfect harmony in the construction and application of its rules. That time will be greatly hastened by such treatises as that of Mr. Pomeroy. . . .

In such a situation of bewilderment it is small wonder that Mr. Pomeroy's work, with its breadth of view, its full sympathy with legal progress and reform, its scientific analysis, its fearlessness, and above all its practical common-sense, was welcomed with expressions of hearty gratitude.²⁹ The great author

²⁹ The judges of the New York Court of Appeals joined in writing: "We take pleasure in congratulating you upon your success in this pioneer undertaking. . . . You have done more than has been done before in reducing to a logical system that which has been to some extent considered as without system," etc. The Fields, David Dudley and Stephen J., the Judges Selden of New York's highest court, Samuel L. and Henry R., and Professor Theo. W. Dwight wrote to the same effect. Judge Dillon asserted, "Whoever reads Mr. Pomeroy's work. . . . will see that order, method and logic, belong equally to the new and the old system." A young author whose star had just dawned into that brilliant legal firmament of the '70's wrote, in part: "The theme which you have treated has been undergoing judicial construction and misconstruction but little over a quarter of a century. Hence there is yet time for a bold and able author to rescue it from the misconception and malformation to which it has been exposed, partly by the incompetence but mainly by the enmity of the judges into whose charge it was entrusted. I feel grateful that this rescue has been made

of the codes, David Dudley Field,⁸⁰ was one of the foremost to congratulate the writer; the Judges of the New York Court of Appeals, then numbering on its rolls the brilliant names, among others, of Folger and Rapallo, joined in a testimonial of more than conventional praise; the book was received with interest even in England and studied by judges so eminent as Sir Robert Phillimore, Lord Chancellor Cairns, and Lord Chief-Justice Coleridge, the last of whom wrote to the author a personal letter expressing his pleasure in its perusal. The hopes which these high critics expressed, as to its influence with the courts, have undoubtedly been realized, to a very considerable extent. And we may say that, if

your self-imposed task,—for I recognize in you the ability and bravery requisite for the occasion. As you undertake to treat the reformed procedure upon principle, conceding to the decisions nothing beyond their intrinsic value, your work has an individuality uncommon in law books. It evidently expresses *your* conclusions, reached by logical processes and proclaimed with uniform fearlessness. Your book meets my unqualified approval because it treats the codes of procedure in the spirit of logical simplicity and generous liberality in which they were conceived and by which alone they should be interpreted: because it exposes much of the meaningless formalism and groundless pretension of the old system that had succeeded in imposing themselves upon the world and creating the impression that that system was not only strictly logical, but almost indispensable; because it admonishes the judges to yield due respect to the law-making power instead of evading its mandates and neutralizing its reforms; and, finally, because, by making the codes better understood, it will cause them to be better appreciated, and by leading to a more correct and uniform system of pleading, it will make them still more worthy of appreciation." Few lawyers will fail to recognize in these sentences the virile style of Mr. A. C. Freeman.

⁸⁰ See essay on, *supra*, vol. V, p. 123.—Ed.

the Code itself is Gospel, Pomeroy, assuredly, was its Apostle Paul.

In the summer of 1878 Mr. Pomeroy was called to the chair of Municipal Law in the newly-established Hastings Law College of the University of California, at San Francisco. His capacity for rapid and sustained labor is well illustrated by the results accomplished in the remaining six and one-half years of his life. Besides organizing the work of the law school, with its nearly two hundred students, and making himself a master of the many peculiarities of California law,⁸¹ he carried, practically or absolutely, the whole burden of instruction of its three large classes; yet in the leisure of five years he found time to write nearly the whole of his "Specific Performance" (1879) and all of his "Equity Jurisprudence" (1881-83), with its enormous research;⁸² and afterwards to edit (with his son) the West Coast Reporter, a weekly publication, to which he contributed several important series of essays,⁸³ on mat-

⁸¹ See his brief *resumé* of the more important of these peculiarities in his memoir of Judge Field, reprinted elsewhere in the present work; this, with its evidence of careful and exhaustive study of the California reports, was written after only two years of residence in California.

⁸² For the first time, he employed, in the preparation of the last third of this work, the services of a literary assistant, in the choice of whom he was most fortunate—Mr. Charles W. Slack, afterwards his successor in the law school professorship, a successful trial judge, a Regent of the University of California, and a distinguished leader of the California Bar.

⁸³ On the "Civil Code" of California and the proper methods of its interpretation (see below); on the "Community Property" system

ters of interest to the Pacific Coast States; and to conduct successfully some of the most noteworthy litigation that has ever come before the Federal courts in California.

The most important of Professor Pomeroy's fugitive writings, measured by the effect produced, was his series of papers on the Civil Code (i. e., Code of substantive law) of California. This Code was substantially identical with the draft code reported to the legislature of New York in 1865, and for twenty years thereafter persistently urged upon that legislature for adoption in that state.⁸⁴ Mr. Pomeroy, at the beginning of his literary career, was somewhat skeptical on the subject of general codification, as has been seen; but his admiration for the Codes of Procedure, in their general principles and features, had, at the time of his removal to California, brought him to a frame of mind quite ready to be convinced of the excellencies of the general Code which for five years preceding had been on trial in the latter state. He was quickly disillusioned. The minute study of the Code which its practical conception of

of married women's property; and on the system of Water rights of the Western States and the Doctrine of Appropriation. The last named series was collected and edited after his death under the title, "Pomeroy on Riparian Rights."

⁸⁴ It has no resemblance to the so-called "Codes" of some Southern states, which are ordinary compilations of statutes, and little in common with the Code of Georgia, a more conservative piece of legislation, which may be roughly described as the statutory enactment of an elementary text-book.

See life of Thomas R. R. Cobb of Georgia, *supra*, vol. VII, p. 309.—Ed.

his duties forced upon him made him familiar with the "errors, uncertainties, and inconsistencies," which "demand a judicial interpretation" for nearly every section; and led him to the conclusion that the only salvation for the law of California lay in the "deliberate adoption of a method of interpretation different from that hitherto applied to statutory law."³⁵ At the time of his death, in February, 1885, the danger was very threatening that this Code might at last be adopted by the legislature of New York. The Bar Association of New York City, therefore, reprinted this essay (April 1885)³⁶ and circulated it very extensively among the lawyers of that state, making it the main weapon in their campaign; and it is understood that the vigor of this pamphlet³⁷

³⁵ That an interpretation according to the ordinary meaning of the language used was an utter impossibility; that the provisions should be taken as declaratory of common law rules, even when apparently very different, unless the intent to make a change appeared from the unequivocal language of the text.

³⁶ The above language describing the Code is taken from their summary of the author's conclusions.

³⁷ It was the subject of a long editorial in the *New York Evening Post and Nation* (April 15th, 1885.) "The codifiers say, why do we not hear from California the same complaints against the evils arising from the operation of the new system, which its critics assure us we are destined to suffer from if we put it in operation here? The reply to this question is that we do hear them and there is behind them the authority of a name which the friends of the code cannot deny or belittle. The late John Norton Pomeroy, it is hardly necessary to inform our legal readers, was a lawyer of the very first rank. . . . As a writer his clearness, strength, and profound knowledge of the law have been unmatched in our time. . . . He was like most lawyers of the present day who approach the subject for the first time, entirely unbiased if not actually inclined to favor the reduction of the

was largely responsible for the final *quietus* put upon general codification there and elsewhere. Thus were the people of the Empire State spared the infliction of this monstrous piece of legislation; of which one small group of absurd and meaningless sections³⁸ has alone cost the people of California many millions of dollars in the immediate expenses of litigation, and which, as a whole and in all its parts, has been an increasing source of perplexity, hindering, as much as any factor (in the opinions of many competent observers), the material advancement of the state to its due position among its sister commonwealths.

In the years 1882-1884, Professor Pomeroy was engaged as counsel in the Railroad Tax Cases,³⁹ involving grave questions of constitutional law. He was also engaged as counsel during this period, in behalf of the farmers, in the famous Debris Case.⁴⁰ The judgment in the latter case was epochal in the economic history of California. By it the

whole body of the law to a statutory form . . .” The editorial then proceeds to give some extracts from the pamphlet, showing the reason why Prof. Pomeroy’s conclusion, “strange as it may seem,” was inevitable.

³⁸ Viz., those defining “marriage” and describing informal modes of adoption of illegitimate children—very vital matters to the estates of some Californian millionaires!

³⁹ *San Mateo County vs. Southern Pacific Railroad Co.*, 13 Federal Reporter, 722, 727-782; *Santa Clara County vs. Same*, 18 Federal Reporter, 385-445.

⁴⁰ *Woodruff vs. North Bloomfield Gravel Mining Company*, 16 Federal Reporter, 25-35; 18 Federal Reporter, 753-813; 8 Sawyer’s Reports, 628; 9 Sawyer’s Reports, 628.

great industry of "hydraulic" mining,⁴¹ which for many years had been filling up the streams and harbors of California and laying waste some of its best agricultural land, was effectually enjoined. Professor Pomeroy's recent studies had peculiarly fitted him for the argument of the chief legal points—joinder of parties, and acquiescence—in this, undoubtedly the most momentous nuisance case in our legal history.

His previous career as an advocate had been limited, substantially, to the ten years of his young manhood.⁴² In his later life it is certain that he had few of the graces of the orator. He always read from manuscript; without it he was hesitating and ineffective. His arguments in the Railroad Tax Cases and the Debris case did little to captivate his hearers. They merely convinced the court; though he had associated with or against him in these great cases much of the foremost legal talent of the state, his clear and cogent reasoning and philosophic breadth so appealed to the judges that their opinions are, in substance, little more than a reproduction

⁴¹ Placer mining on a gigantic scale, excavating miles upon miles of the foothill country to the depth often of hundreds of feet by the force of streams of water directed at enormous pressure upon the gold-bearing gravels. Many of these excavations lie directly on the line of the General Pacific Railroad and are a familiar object to travelers.

⁴² It requires some stretch of the imagination to picture Mr. Pomeroy as a brilliant young jury lawyer, especially as counsel for the defendant in a famous murder trial; but "Squire Pomeroy's" speech for Ira Stout (1856) was food for gossip among the farmers round about Rochester at least twenty years after.

of his arguments—often of their exact language.⁴⁸

At the time of his death he was just beginning a treatise on Equity Pleading, having, with characteristic thoroughness, completed a voluminous correspondence as to local details of equity practice with the Supreme Courts of each of the states and territories. Other large projects which he intended to take up were, "Institutes of American Law," a modern Kent's Commentaries; and a treatise (already mentioned) in several volumes, on Constitutional Law. He died, at San Francisco, after a brief illness, of pneumonia, February 15th, 1885, aged fifty-six years and ten months.

Professor Pomeroy was slight in physique, far from robust, much less athletic; but his powers of mental endurance were unusual. His hours of intense application were rarely less than twelve a day; if the sensation of mental weariness was ever really known to him, it had no effect upon his work. He had that most useful sort of memory which habitually classifies and correlates the information acquired; his mind was a well-ordered store-house of ideas and principles, rather than of facts and

⁴⁸ "Like his works upon the law, his arguments were always lucid, exhaustive, and eminently instructive—such arguments as courts desire to hear when great interests and great and far-reaching principles are involved." Lorenzo Sawyer, United States Circuit Judge, January 28th, 1888. (In the *Debris Case*). "I think it was the general opinion of those who heard him, as I know it was of the judges whom he addressed (Sawyer and Deady) that his argument was a masterly and exhaustive presentation of a great case;" Deady, Circuit Judge, January 24th, 1888.

instances. On this accurate and systematic memory he was able to rely, in his professional writing, to a very uncommon degree. Thus, the text of his "Equity Jurisprudence" was to a large extent written in his study, with but little previous consultation of authorities for that special purpose—a remarkable fact, in view of the reputation of that text for minute accuracy. The notes, with their great research, were usually prepared by him after the text was written. Each treatise was thoroughly mapped out in advance, chapter and paragraph, and the subject analyzed down to the last detail. Cultivating as he did, at least in his later works, a difficult style of literary composition, abounding in long, periodic sentences—sometimes reminding one (but with a difference) of the labyrinthine involutions of Rufus Choate⁴⁴—he attained such clearness in the results that the complexity of the mechanism is hardly noticed; yet his manuscript—always a first draft, and always in his own handwriting—was absolutely free from erasures and corrections. His power of concentration was as remarkable as his habit of forethought and analysis. The first book was written amid the distractions of a crowded schoolroom; at all times, then and thereafter, he held himself in cheerful readiness to be interrupted with an irrelevant question, even in the very act and heat of framing his most elaborate periods;—a trait the signifi-

⁴⁴ Or as Judge Bliss puts it, of "the old bill in chancery without its technics, as presented by an able and enthusiastic equity pleader."

cance of which the tribe of authors,—*genus irritabile!*—can best appreciate.

He was a constant reader, rather than omnivorous. The higher mathematics had been the intellectual passion of his early young manhood, but were reluctantly abandoned.⁴⁵ His library was well stocked with the works of the chief Continental jurists and publicists. A few standard English authors were read again and again; of these, DeQuincey was, perhaps, the favorite, and left some clear traces in his literary style; he was also a faithful Boswellite.⁴⁶ Exercise was found in walks of moderate length, solaced by his ever-inseparable pipe, and companioned by his youngest child or, more frequently, by some favorite volume; moving, thus, through the city's crowded streets, but at the same time living and having his being in Johnson's London or DeQuin-

⁴⁵ His elder brother, Henry, was for many years professor of mathematics in Washington University, St. Louis.

⁴⁶ A pupil and life-long friend writes: "The literary quality of Prof. Pomeroy's law books, have always been recognized and commended, and the fact would probably be inferred by most readers of these books that he had a wide acquaintance and made a close study of the best works of English literature. He often said that he read no novels; that he only read over a few standard works of fiction like those of Scott, but if any good novel appeared he generally confessed that he had read it. His knowledge of history was encyclopedic. It would be a great mistake to suppose that his intercourse with his students was valuable only on account of the knowledge of jurisprudence which he imparted to them. There were very few topics which can come up in conversation among educated men which he would not discuss with accuracy and fullness to the very great enlightenment and stimulation of the minds of his youthful companions." Vice-Chancellor Stevenson of New Jersey.

cey's dreamland, he sometimes chanced into embarrassing encounters; but the habit, in spite of such manifest risks, was excused by him as a useful and even necessary one.

He was a quiet (by present standards) but devoted lover of nature. In his residence on the banks of the Hudson, and in his native city, with its rich environment, he found much to gratify this taste; in California, it strengthened his years of greatest accomplishment with a constant and profound enjoyment. To the great advantage of his work, both in amount and quality, he gave his summers to exploring the endless beauties of that state; driving with his family over unfrequented passes of the Sierras, and drinking deep the inspiration of those noble crags and canyons and majestic forests. It is interesting, also, to recall that the little study where "Equity Jurisprudence" was wholly written gave westward upon a view of ever-changing beauty and suggestiveness—the Golden Gate, with its setting of cliffs and mountains, and beyond, a far glimpse of the Pacific—in that city whose "perfect landscape" and "imperial position," we are told,⁴⁷ has almost no rival in the world.

Of Puritan and clerical ancestry, he was a man of devout and earnest religious faith, which pervaded every thought and action of his life. Brought up in all the strictness of an old-fashioned Presbyterian

⁴⁷ James Bryce, in *American Commonwealth*, vol. II, 821, apparently describing the view from that same study.

training, after his marriage he joined the Episcopal communion, in which Mrs. Pomeroy was, during her entire lifetime, an indefatigable worker; in the liberal English theologians of the Broad Church school,—Farrar, especially,—he found, in his last years, a most congenial study. While too busy a man for general social life, he was by no means a recluse. His wife brought to his household the hospitality and simple charm of the old-time South.⁴⁸ To his students his home was always open; with many of them he maintained a life-long intimacy. Among his acquaintances in San Francisco, mention should be made of Professor James Bryce, M.P., author of "The American Commonwealth," who, on one of his tours of observation in America, visited Professor Pomeroy, much to their mutual profit;⁴⁹ and also of Mr. Justice Field, his acquaintance with whom soon ripened into a warm and devoted friendship. Between them there was an intellectual sympathy at almost every point; and on Judge Field's part the helpfulness and solicitude, one may almost say, of an elder brother. Judge Field fulfilled Mr. Pomeroy's ideal of a great judge as did no other con-

⁴⁸ Mrs. Pomeroy (b. 1829; d. 1898) survived him thirteen years. Their children were: Howard Norton, (b. 1856), Carter Pitkin (b. 1858), an attorney of San Francisco, and for nearly twenty years past reporter of the decisions of the Supreme Court of California; Harriet Howard (b. 1860, m. 1887, Professor Wm. Gilman Thompson, M. D. of New York City); and John Norton (b. 1866).

⁴⁹ Professor Bryce wrote, November 1882, asking for criticism of an essay; "There is no one in your country whose opinions and judgment I value more than yours."

temporary; and in his analysis of Judge Field's judicial attributes one may readily see a reflection of some of his own mental qualities.⁵⁰

Any lawyer acquainted with Mr. Pomeroy's traits and the influences that had molded his mind might have predicted that a work on Equity from his pen would be of more than ordinary merit. That it was written with a profound love of his subject goes without saying. But it was, further, inspired by a sort of missionary zeal, prompted by the well-grounded fear, expressed in his preface, that, under the union of legal and equitable rights and remedies by the Reformed Procedure in England and the "Code" states, "equitable principles and doctrines . . . would gradually be displaced and supplanted by the more inflexible and arbitrary rules of the law." But with this zeal and this affection there was, I believe, no trace in his attitude towards his subject of that false sentimentalism into which even

⁵⁰ See the essay on Judge Field, *supra*, vol. VII, p. 48.—Ed.

One of his New York students thus characterized Professor Pomeroy: "Professor Pomeroy had many qualities which endeared him to his friends. He was always dignified, but utterly free from pretension. He was outspoken, but modest and gentle. He was genial and charming in his companionship. His associates, for the most part, were persons related to him in some professional or literary way. He was always happy when his students were about him. He could even write a lecture while they were holding moot court in the same room and would declare he was not interrupted. He was the friend of every student and every student was his friend. He never outgrew his friendship for his graduates. He would examine their briefs after they had been in practice for years, and advise them as if he were their elder brother. He had the confidence, the esteem, the love even, of those he instructed." Chauncey B. Ripley, in Memorial Address, 1888.

the most level-headed judges are apt to flounder.⁵¹ The boundaries between the ethical and the juridical fields were, to him, always sharply defined.

The book, in point of form, has some serious defects. It is a *torso*—a magnificent fragment; the last, and in his own judgment, the most important part,⁵² remained only the framework of an incompleting structure. On the other hand, a friendly criticism, made of his "Remedies," is even truer of the greater work.⁵³

Every one must prophesy according to the gift that is within; but in reading this book, along with the pleasure which its discussions have given me, I have occasionally felt that I was too long delayed by introductory matter, that repetitions sometimes were made which could have been saved by reference to previous pages, and that sometimes well-rounded sentences could be shortened by the use of technical terms; I have been reminded of the old bill in chancery without its technics, as presented by an able and enthusiastic equity pleader.

Besides his general mental equipment, Professor Pomeroy had some special qualifications for his task. One of these was the tendency, illustrated in his teaching and indeed in all his work, to give full

⁵¹ Among innumerable examples, perhaps that recorded in Pomeroy's *Equity Jurisprudence*, vol. II (3d ed.) sec. 898, note (a) is as amusing as any. See further Prof. Woolsey's description of his attitude towards certain topics of International law, *ante*, p. 109.

⁵² "The division of equity which is concerned solely with remedies is much broader and more comprehensive than that which is concerned with equitable primary rights and interests." Pomeroy's *Equity Jurisprudence*, section 127.

⁵³ Judge Philemon Bliss, author of "Code Pleading," in *Southern Law Review*, vol. II (new series), 417.

value to contemporaneous developments in American law. An American treatise on equity, he says in his preface, "must recognize the existing conditions, both of law and equity, the limitations upon the chancery jurisdiction resulting from varying statutes, and the alterations made by American legislation, institutions, and social habits. . . . It is true that the fundamental principles are the same as those which were developed through the past centuries by the English chancery; but the application of these principles, and the particular rules which have been deduced from them, have been shaped and determined by the modern American national life, and have received the impress of the American national character." How well the pursuit of this ideal, with the enormous labor that it involved, was carried out, may be judged from the language of a critic who has long stood as our most brilliant representative of a type of scholarship, the very opposite of Professor Pomeroy's—Mr. Justice Holmes.

I value your work just in proportion as it becomes characteristically yours, and therefore especially in those parts where you so luminously explain the shape that Equity doctrines have taken in this country. It is a most curious contrast with the work of another man of whose abilities I have also an exceedingly high opinion. I mean——. For while he despises American Equity and indeed any doctrine that does not follow the theory of the *Forum Romanum* as practiced in the time of Lord Eldon, you, as I think far more rightly, have realized that the first and last question as to the law is what is the *fact*.—If it is administered in a certain way throughout a great Empire it does not matter a

straw whether the mode of administration does or does not adhere to the principles which prevailed somewhere else a hundred years ago—the only interest of the law is that it *is*. Before you, so far as I know, no attempts have been made to show systematically the characteristic development and lines of growth of equitable doctrines in this country. And this I think you are doing with much ability in a form which is at once clear, interesting and in a high degree instructive and useful.

Again, the book is the foremost practical application of the school of Austin. The definitions of this school, of primary and remedial rights, etc., furnish the author with some fundamental distinctions.⁵⁴ But the general influence of his juristic studies is visible in many ways. It aided his conception of Equity as a coherent system, rather than a mere haphazard growth, a fragmentary series of historical accidents. Mr. Pomeroy was a jurist first, and a lawyer afterwards. Some have doubted the value of analytical jurisprudence to the common-law student; its value as a discipline for the student of equity may well be gaged by its influence on this book.

⁵⁴ To quote again from Judge Holmes' letters—the most interesting criticism of the work that I have encountered—"I think I am inclined to attach less importance to the conception of primary rights and duties than formerly. Duty and right in the legal sense, stripped of their moral atmosphere, are simply convenient indexes to the incidence of the public force,—a way of summing up the modes of avoiding having your goods sold" etc. Two months later: "I wrote you, before, my doubts as to the ultimate value of the conception of primary rights, etc.; but I must certainly modify what I said as far as this: that you have made a most admirable use of it for the purpose of explaining the distinction as to Equity Jurisdiction. If I were to pick out the parts which I had read with the greatest pleasure, I should select that whole discussion of the principles of jurisdiction."

Most important of all, Pomeroy's Equity was written at a fortunate time. The labors of that brilliant group of English Chancery Judges of the third quarter of the nineteenth century, whose restatements of the doctrines and principles of Equity amounted almost to a re-creation, were just drawing to a close. For some of the older fathers of the science Professor Pomeroy had but slight respect. His feeling as to Lord Eldon had in it a shade of contempt;⁵⁵ even for Kent and Story⁵⁶ his admiration had some reserves. But in men like Westbury, and Cottenham, and Jessel, he found his masters. His work may be described as a fusion into a compact mass of the scattered labors of these great men, a welding of it—often with the utmost ingenuity and resource,⁵⁷—with the heterogeneous product of our innumerable courts and legislatures.

An important difference between the English system and the American system, as to means and methods of legal growth and development, has sometimes

⁵⁵ See in sketch of Judge Field, in this work, *supra*, vol. VII., p. 48. "That exact knowledge—of the intricate minutiae of real estate and conveyancing law which alone gave Lord Eldon his preëminence among English chancellors.

⁵⁶ Story he considered lacking in the "creative power" of the ideal judge; see same sketch, vol. VII, p. 50; as to narrowing tendencies of some of Kent's decisions, see Pomeroy's Equity Jurisprudence, vol. IV, sec. 1357, a passage much quoted.

⁵⁷ As in the chapters on Priorities and *Bona fide* Purchase. Professor Pomeroy did not hesitate to prefer modern English rules to rules that were backed by the highest American authority; see e.g. sections 960, 962 (constructive fraud between attorney and client and parent and child.)

escaped attention. That immortally-apt phrase of the English poet,

Slowly broadening down
From precedent to precedent,

applies to our law, but with less of exactitude. With us, each advance is the resultant of many forces. We profess to be ruled by precedent, but from the very vastness of their number we rely, rather—be it for weal or woe—on the rapid and constant interchange of opinion,—of “persuasive authority,”—from state to state, from text-writer to judge. The word *dictum* is not, with us, a word of opprobrium.⁵⁸ In our composite system, the text-writer of high authority has a place of influence—unknown in the English law—nearly equal to that of the greatest judge; a dignity, realized or not, approaching that of the juristic writers in the Roman law. To few works, it is true, is such authority conceded; Pomeroy's Equity Jurisprudence at once took rank with them; its prestige and influence, after a lapse of twenty-five years, appear to be increasing.⁵⁹

⁵⁸ As to the value of *dicta*, see a very characteristic passage from a brief of Professor Pomeroy's adopted by the Court in one of the Railroad Tax Cases, 18 Federal Reporter, 423; and again, *Id.* 787, 788.

⁵⁹ As to the influence with us of the language and general discussions of the judges, rather than of the precise points decided, a study of “Rose's Notes to the United States Reports” is enlightening. Comparative statistics as to citation of individual judges and of text writers would be interesting; compare as to citations of reports of the various states, those in 8 Harvard Law Review, p. 501; as to citations of text-books, American Law Review, vol. XXXVII, 312. The comparison appears to bear out the propositions referred to. In 37 American Law Review, vol. XXXVIII, 312, it appeared that Pomeroy's

The most obvious way in which this work has exerted an influence, has been in expressing in a definite and widely-accepted form, in stamping with permanence, many of the general rules and doctrines of equity. Few sentences of the book, in its interpretative parts, have failed of adoption by some court, often by many courts. Its effect has been that of a partial codification of this most vital portion of the law, with none of the dangers, in loss of flexibility, that attend a general statutory enactment. The hope, so earnestly expressed in the author's preface, that his book might help to avert, in this coun-

Equity Jurisprudence was cited, in a recent period, more often than any other single work, and his last three books much oftener than the combined works of any other author. Such statistics, of course, vary from year to year, but only within a certain range.

Compare the following recent letter from a judge of a particularly able equity court, speaking of the book in question:

"That I regard as among the three greatest, if not the greatest of law books that have been written in the English language. It is distinctly superior to all others on the subject of which it treats, and considered abstractly it equals if it does not excel the Commentaries of Blackstone and Kent. Lacking nothing in comprehensiveness or detail or arrangement, this work's chiefest excellence yet lies in its singularly clear, logical and philosophical presentation and illustration of the principles of equity. It has exerted a greater influence upon the decisions of the Supreme Court of Alabama in equity causes than all other texts combined. Even the one case that I now recall in which I felt constrained as a judge to take issue with Mr. Pomeroy, furnished evidence of the profound regard we have for his work." The late Chief-Justice Thomas N. McClellan, of the Supreme Court of Alabama, October 16, 1905. In nearly the same language, Prof. H. R. Hutchins, Dean and Professor of Equity in the University of Michigan Law School, writes (*Michigan Law Review*, vol. IV, 248): "It is probably not too much to say that during the past twenty years this work has exerted directly through the tribunals of last resort, a greater influence upon our jurisprudence than any other single treatise."

try, the threatened decay and hardening of equity, appears to have been abundantly fulfilled.

Beyond this, it illustrates—though, from the nature of the subject, to a less degree than his “Code Remedies”—the true creative power, which, under the American system, is within the function of the authoritative text-writer even more than of the judge; the power to seize an obscure or neglected principle, to drag it to the light, to show its important applications to the practical affairs of life, and by the mere force of convincing logic to compel its adoption by the courts. This power is most strikingly shown in the well-known chapter on the “Multiplicity of Suits” jurisdiction, where the author’s enunciation of a neglected but most beneficial principle, freed from the meaningless trammels that had been placed upon it by a few courts, may, in view of the results, be said almost to have created a new department of Equity.⁶⁰

⁶⁰ Other instances of his faculty of seizing and emphasizing the few cardinal principles in a confused subject may be found in the chapter on Mistake of Law. His attitude towards subjects in which there are many shades of difference in the views of the several states, is in strong contrast with that of some recent able writers in other fields; his habit was to group the states into broad classes, to attempt a partial harmony, rather than by minute analysis of the *differentiæ* of rulings, to deepen the minor lines of cleavage.

A striking instance of the respect accorded to Mr. Pomeroy’s views is the following: “In section 1046 he had occasion to condemn as a misuse of terms, but in a purely *obiter* manner, the famous “trust fund” notion of the capital stock of corporations, first introduced into our law by Judge Story, and widely adopted by courts and text writers. This criticism was given such prominence by the Supreme Court of the United States and by other courts, in their opinions in

Closely akin to this creative power, has been some measure of success,—which may be guessed at, rather than proved,—in stimulating independent thinking.⁶¹ To a careful student, it abounds in germs of fruitful suggestion. Certain pregnant sentences,⁶² often quoted, in one of the briefer chapters have, it may be conjectured, been a factor of some consequence in the astonishing reversal of the whole judicial attitude towards the remedy of Injunction, and in the remarkable development of that branch of equity in the last three decades.

But there is ground for thinking that Professor Pomeroy's work has had a more general, and far more important influence upon our courts of equity.

certain cases of epochal importance, as to make it seem of almost decisive influence; see *Hollins vs. Brierfield*, 150 United States, 371; *Jewelry Co. vs. Velfer*, 106 Alabama, 205; etc.

⁶¹ An eminent equity judge writes: "A year or two after the book was published a very energetic and studious young lawyer who long ago rose to the very top of his profession in the State of New York, remarked to me that he had found the greatest possible aid in Pomeroy's Equity, which he had just procured because he said that when the book did not show what the established equity doctrine was because no doctrine had yet been established, it pointed out unerringly as it seemed to him, how the doctrine ought to be established and would be established." Vice-Chancellor Stevenson of New Jersey.

⁶² Section 1357: "The ideal remedy in any perfect system of administering justice would be that which absolutely precludes the commission of a wrong, not that which awards punishment or satisfaction for a wrong after it is committed," etc.; see more fully, Section 1338. The statement in note 3 to Section 1338, "The general effect produced by some text-books and judicial opinions might lead the reader to suppose that the main object of the writers or the judges was to show when injunctions could *not* be granted," is as untrue at the present day as it was emphatically true at the date when it was written.

What, it is pertinent to ask, are the general characteristics of these courts to-day? Their truly constructive and creative work has been enormous; thirty years ago, the law of Receivership and many most vital members of the law of Injunction, existed but in embryo. No student of contemporary English Equity—with its increasing technicality, its petrification of living principles into hard and fast rules, its tendency to ignore or overthrow the masterly generalizations of the great decades preceding—can fail to feel a sickening sense of loss. On the other hand, one rising from a protracted study of the decisions of our best equity tribunals—with the harmony, in the main, that unites them, the thoughtfulness, the originality, the firm grasp of new problems, the pervading sense of justice and liberality that gives tone to all their work—may well experience some thrill of reverence, some stirring of deepest patriotism. A great chapter in legal history has been unfolding before our eyes.

Much of this creative work has been in fields upon which our author touched but lightly; yet Pomeroy's Equity has become part and parcel of the judicial consciousness, in this generation, as have few other books. It may be, therefore, no mere coincidence, that the spirit of these great achievements of our judges is, in all particulars, precisely that which animates his writings. Largely through his labors, not England, but America has become—perhaps unconsciously—true heir to the labors of England's

greatest chancellors; the creations of those master-minds—noblest fruitage of the English intellect and character—have become part of the very bone and sinew of American institutions; it is they that now nourish the life of our distinctively American equity.

The period, in our legal as in other sciences, of the many-sided scholar, has, doubtless, passed beyond recall; we are far advanced in the age of specialists. A lifetime barely suffices, now, for the study of a single subject. For the stupendous labors that have long cried aloud for willing craftsmen, Professor Pomeroy might not have been adapted; infinite patience in accumulation, and minute research, were not his special talents. The qualities, rather, which pervade his work and may give some of it endurance, are those which mark the teacher—qualities of force and clearness, of freedom and originality, a strong sense of justice and above all a moral earnestness. A pupil's⁶⁸ tribute, therefore, may well conclude this sketch:

He preached the law; he preached it as truth, a truth which he felt, thought, and lived. I have never anywhere seen anyone who approached the entire and absolute devotion which ruled Professor Pomeroy's life. . . . From morning till night his thought was concentrated with an intensity that equals that of the most excited trial or argument, upon questions which had no more pecuniary interest or benefit to him than the most abstract problem in metaphysics; and he carried into them all the fervor and devotion that could be procured from any counsel by the

⁶⁸ Mr. Elihu Root, March 5, 1885.

greatest rewards of his profession, by the largest fee, or by the keenest personal interest in a client. . . .

Beyond his intellectual power, beyond his devotion to the law, beyond the energy and will which he brought to bear in his instruction, beyond the high standard of ethics which he presented, there was the pure, simple and genial character, which I know endeared him to the hearts of all his students. . . .

Few men with so little desire for display, with so little personal ambition, making so little noise in the world, have accomplished so much.

Twenty-one years later the same pupil adds,

I doubt if he would have been, under any circumstances, a great advocate; I am sure that he would have been a great judge; I know that he was a great teacher. As I have come in later years to know more of the men who hold great places in the world, my respect and admiration for him have not diminished; I have, I think, rather a clearer appreciation of his title to high rank among the men of his day.

HORACE GRAY.

HORACE GRAY

From a photograph taken when Judge Gray was fifty-six years of age.



HORACE GRAY.

1828-1902.

BY

SAMUEL WILLISTON,¹

Weld Professor of Law in Harvard University.

HORACE GRAY was born in Boston on March 24th, 1828, the eldest child of Horace Gray and Harriet Upham. His grandfather, William Gray, one of the best known men in New England in his day, spent the earlier portion of his life in Salem but moved to Boston and became the wealthiest man in the city. His fleet of sixty vessels is said to have made him the largest ship-owner in the country. He was the first president of the State Bank in Boston, and in 1810 was lieutenant-governor of Massachusetts. He married the daughter of John Chipman, a lawyer of Essex County, and had

¹ In the preparation of this sketch the writer has been greatly aided by the addresses made by members of the Washington and Boston Bars at the exercises held in those cities in commemoration of Judge Gray, and especially by the memoir prepared by Senator Hoar for the Massachusetts Historical Society and published in volume XVIII, of the second series of the Society's proceedings. This indebtedness is not only for facts, but in some instances for the language in which the facts are stated. Had it not seemed undesirable to break the continuity of the narrative with frequent footnotes specific acknowledgment would have been made.

several sons who inherited their father's fortune and were influential men in Boston. More than one of them possessed the strong bent for history and public affairs which distinguished the subject of this sketch. Horace Gray the elder was graduated from Harvard College in 1819, and became a manufacturer. Like his father, he married the daughter of a lawyer, his wife's father being Jabez Upham of North Brookfield.

Horace Gray the younger was prepared for college in Boston at private schools. Though the youthful age at which he entered college would lead to the inference that most of his boyhood was spent over books, such was not the case. His mother had died of consumption and the son attained his great height when he was little more than twelve years old. Fearing lest the boy should outgrow his strength, his father gave him a gun and turned him out of doors. The family lived on Nonantum Hill which was then a rural neighborhood, though now thickly settled; there was abundant chance not only for country rambles, but also for sport with the gun. In this way his early tastes were formed. He was graduated from Harvard in the class of 1845 when but seventeen years of age. He did not receive a part at Commencement, which indicates that his rank was in the lower half of his class. This may well have been due to his extreme youth. Perhaps also the required studies were not such as engaged his interest. Senator Hoar who was a member of the class of 1846

has given in his autobiography an interesting account of the conditions of student life at the time.

After leaving college young Gray did not at once adopt a profession. It is possible that he looked forward to a life of studious leisure. His predominant intellectual interest was still in natural history, and it is partly due to accidental circumstances that he became eminent as a judge, rather than as an ornithologist or a botanist. His father was a wealthy man, and the son had every reason to expect a large inheritance. While he was traveling in Europe, however, in 1847, his father's business enterprises met with disaster and the son found himself under an obligation to earn his own support. He hastened home and in February, 1848, entered the Harvard Law School. Judge Story had then recently died and Professor Greenleaf retired at the end of 1848. But the school still maintained the prestige acquired under these teachers. Joel Parker, formerly chief-justice of New Hampshire, succeeded Judge Story, and Theophilus Parsons succeeded Professor Greenleaf. Methods of instruction had not been much systematized in those days; residence for a year and a-half entitled a student to a degree, and the only evidence of such residence was payment of three semi-annual term bills. But the students included, with many who were idle and some who were hopelessly incompetent, a number of young men of the highest type from various sections of the country, and there was an atmosphere of enthusiasm about the

place which is the first requisite for successful work.

The arguments before the professors in moot courts were an important feature in the life of the school, and indeed afforded an ambitious student his only opportunity of distinguishing himself before his teachers and fellow students. Judge Gray remained at the Law School the required three terms and was graduated with the degree of Bachelor of Laws, in 1849, in the same class with Senator Hoar who says of him—"He threw himself into the study of the law with an untiring industry begotten of deep enthusiasm. He soon took his place among the best scholars of the Law School."²

Besides Hoar, Gray's most intimate acquaintance in the Law School was John Felton, who afterwards achieved high distinction at the bar of San Francisco.³

Senator Hoar in his autobiography says of Felton that he "took what was then an unusual method of making himself a good lawyer. That was to begin to deal with a legal principle in historic order, going back to the first case where it was announced and tracing it down through the reports, making no use of text-books."

In view of the fact that Judge Gray followed throughout his life in all his work the same method, this early friendship is worthy of remark.

² Proceedings of the Massachusetts Historical Society. Second series, vol. XVII, 161.

³ See the account of him in Senator Hoar's autobiography, vol. I.

It is not without interest also in this connection to note that C. C. Langdell, famous as having introduced the case method of teaching law was a member of the school shortly after Judge Gray, though somewhat his senior in years.

In 1895, at a meeting of the Harvard Law School Association, held to commemorate the twenty-fifth anniversary of Professor Langdell's appointment as Dean of the Harvard Law School, Judge Gray said, addressing the presiding officer, James C. Carter, and referring to Professor Langdell,—“Mr. President, you and I remember some forty-five years ago, when we first made his acquaintance, and when from him we began to learn jurisprudence.” In the preface to his first case book,⁴ Professor Langdell speaking of his conviction that law could be taught or learned effectively only from cases, says,—“I had entertained such an opinion ever since I knew anything of the nature of law or legal study; but it was chiefly through my experience as a learner that it was first formed, as well as subsequently strengthened and confirmed.” These words might doubtless have been written by Judge Gray of his own experience, for he also early learned by the case method. By this he would have understood, as Professor Langdell at the beginning of his career as a teacher understood, not so much the comparison of selected cases with a view to analyzing the proper governing principle, as the examination in chronological order of

⁴ *Cases on Contracts* (1871).

all cases involving the question under consideration. This method of study was primarily historical, though in its successful application it necessarily became also analytical. Throughout his career Judge Gray retained a high respect for the work of Professor Langdell, and when the latter became Dean of the Harvard Law School, the Chief-Justice of the Supreme Judicial Court of Massachusetts on more than one occasion asked the aid of his opinion and reasoning, though most of the Bar of Boston at that time looked with distrust upon the innovations and the innovator at the Harvard Law School.

It is a striking circumstance that these three men, Felton, Gray and Langdell, who achieved high distinction in different branches of the profession should have adopted while students, at about the same time, the same method of study.

So brief a period of study as the Law School required was not supposed to complete the education of a lawyer. Study in a lawyer's office and attendance at court was still regarded as essential, and Judge Gray continued his studies in the offices of Sohier and Welch and of John Lowell, and was not admitted to the bar until 1851. Not long after his admission, Luther S. Cushing, the reporter of the decisions of the Supreme Judicial Court becoming ill and unable to perform his duties, Mr. Gray was selected as a capable young man to take his place temporarily. Thus he was the actual reporter of the decisions in the last volume of Cushing's Re-

ports, and prepared the volume for the press. At this time in the words of his friend and contemporary Hoar "he had already acquired a great stock of learning for a man of his age. Even then his wonderful capacity for research, the instinct which, when some interesting question of law was up, would direct his thumb and finger to some obscure volume of English reports of law or equity was almost like the scent of a wild animal or bird of prey. He got acquainted on the circuit with all the great Massachusetts lawyers of that day—Choate and Curtis and Bartlett and Charles Allen and Loring; I suppose no other bar in the country except that of the Supreme Court of the United States could show their equals, and they had no superiors even there. When any one of these men was arguing or was waiting to argue a great case, the young reporter would often appear to him with a case which the counsel had not discovered and which was pat to the point. So, although he was hardly out of his boyhood, they all got to like him as a companion and to respect him as a lawyer."⁵

Thus it came about that when Mr. Cushing died, Horace Gray, Jr., was appointed reporter of decisions in accordance with strong recommendations from many leading members of the bar. The office of reporter in Massachusetts at this time had an importance which may not be readily understood

⁵ Proceedings of the Massachusetts Historical Society, vol. XVIII, 114, 162.

to-day. Those who had held the office had all been men of standing, and the attendance of the reporter at the sittings of the court was supposed to furnish a training such as to justify his own ultimate promotion to the bench. Of Massachusetts reporters, Metcalf, Gray, Allen and Lathrop have been elevated to the Supreme Bench. Gray held the office until 1861, and prepared the sixteen volumes of Massachusetts Reports covering this period which bear his name—excellent examples of the reporter's art. In this work Metcalf, then on the bench and with whom he early had very pleasant relations, had given him the model which he sought to follow. Throughout his life he retained a keen interest and critical taste in everything pertaining to law reporting. The clear and concise statement of the cases, the head notes and indices made on right principles accurately carried out, the orthodoxy of the abbreviations in the legal citations in a volume of reports were always matters of prime interest and importance to him. When he was chief-justice of the court, it was his habit to read the proof of each volume of reports as it went through the press.

The reporter was at that time allowed to engage in the practice of his profession, though the necessary attendance at the sittings of the court and the time otherwise required for the proper performance of the duties of the office increased the difficulty of attracting and retaining clients. Mr. Gray's name appears for the first time as arguing a case before the

Supreme Court in banc, in 1854, in *Pond vs. Williams*.⁶ The last case he argued before taking his seat as one of the judges of the court was *Wales vs. China Insurance Co.*,⁷ in January, 1864. In the ten years that elapsed between his first case and his last, he argued twenty-nine other reported cases. Opposed to him in these cases were such men as Rufus Choate, B. R. Curtis, Sidney Bartlett, Otis P. Lord, Benjamin F. Thomas and A. A. Ranney—leaders of the profession. In view of his engrossing duties as reporter during the greater part of this period, and in view of the importance of the cases in which he was engaged, this showing justifies the conclusion to which all other evidence points, that he was early recognized as a young man of very unusual attainments and promise in his profession. In 1857 he had formed a partnership with Ebenezer Rockwood Hoar and Edward Bangs, but this partnership was dissolved in 1859 by the elevation of Hoar to the Supreme Court of the state. He had for brief periods other partners. Mr. Lewis S. Dabney referring to this period said: "Mr. Gray then occupied offices at No. 39 Court Street, two large rooms on the third floor,—one in the front, the other at the back of the old Minot Building, which has long since been torn down and rebuilt. A few months before I entered the office, Mr. Wilder Dwight, who had been for some little time his partner, had left him to go

⁶ 1 Gray's Reports, 630.

⁷ 8 Allen's Reports, 380.

into the army, and Mr. Charles F. Blake had become his partner. The office was considered one of the best in Boston in which to study law, and the young man who was admitted there was deemed fortunate. Judge Hoar then on the bench of the Supreme Court, had an adjoining office with the late Mr. Edward Bangs. There was a communicating door, through which the judge would often stroll for a few minutes' talk with Mr. Gray, who still had in hand some uncompleted volumes of his reports of decisions,—uncompleted because the judges had not handed down their opinions. There was no statute in those days, as there now is, requiring the justices to hand down their opinions promptly upon the rescript. There, for about a year, I enjoyed the benefit of Mr. Gray's assistance and advice in my law studies. He always took a great interest in his students, which by no means ended when they graduated from his office. He followed their after-careers and always kept the run of them, never forgetting they were 'his boys,' as he often called them. He had already a large library, containing nearly all the English reports and the reports of very many states, besides Massachusetts and the Supreme Court of the United States and the Circuit and District Courts. He taught us to be industrious and thorough in the examination of questions of law, and to trace the history of the decisions on important subjects. There were several important cases in the office. Among others I recall particularly

the information in the name of the Attorney-General against the Rector and Church Wardens of Trinity Church, which he was then preparing to bring, and which is reported in 9 Allen, touching the performance of the charitable trusts of the will of William Price. He had gone on the bench before the case was argued, so that his name does not appear as counsel in the report, but I well remember how the law of charities and the cases on charities were searched from the beginning."

During all this early period Mr. Gray took a keen interest in the stirring political life of the time, and here once more the words of Senator Hoar must be quoted:

Mr. Gray never held a political office and, so far as I know, never took an active part in any political campaign. But he was profoundly interested in the great public questions with which the American people had to deal in his lifetime. There were among his near kindred, in his youth, men of great ability and high character, very influential and eminent leaders of the Whig Party. They were men especially likely to influence a youth just coming to manhood, especially if he were brought within the circle of their personal influence. The social life of Boston and the scholarship of Cambridge were on that side. Yet Gray was an original Free Soiler. He had a high personal regard for Mr. Winthrop, with whom he had a family connection. But he voted steadfastly for John G. Palfrey, whose candidacy was peculiarly repugnant to the Whigs, and to the high social circles in Boston and Cambridge, because he had refused, when a Whig representative, to support Mr. Winthrop for Speaker. The fires of those old controversies are all extinguished now. But it required great independence and great courage for a young man like Gray, just

coming into professional life in Boston, to take his part on that unpopular side.

It should be added further to the credit of the young man's judgment as well as courage that his temper of mind was naturally conservative. To break from tradition and impair or destroy historical continuity was not easy for him. Whether it was a cause or an effect of his political views, he associated intimately at this time with George F. and Ebenezer Rockwood Hoar, Charles Francis Adams, Senior, and Richard H. Dana. He was a candidate in 1860 for the Republican nomination for attorney-general of Massachusetts, but Dwight Foster was a successful competitor. After war broke out in 1861, Governor John A. Andrew frequently sought his legal advice on the novel problems that the war created. It is evident, therefore, that when little more than thirty years old Gray was already an important figure in the political party which then dominated Massachusetts and with slight variation has done so ever since. Throughout his life he took a keen interest in political affairs, but after he became a judge his strict ideas of judicial decorum restrained all public expression of his political opinions.

On August 23d, 1864, he was appointed by Governor Andrew, an associate-justice of the Supreme Court of the state in succession to Honorable Pliny Merrick. He was thirty-six years old at the time, the youngest man ever appointed to the office; but young as he was, the vacancy in the court which he

was appointed to fill was not the first in regard to which his name had been prominently mentioned. Four years earlier when a vacancy was created by the elevation of George T. Bigelow from the office of associate-justice of the court to that of chief-justice owing to the death of Chief-Justice Shaw, Gray's name had been seriously considered.

For the next seventeen years Judge Gray's life was bound up with the court of which he was a member. By the death or resignation of the five other justices who were members of the court at the time of his appointment he became the senior associate-justice in the short period of five years, and after the death of Chief-Justice Chapman, became on September 5th, 1873, chief-justice. His great capacity for work was exerted unceasingly towards the single end of carrying on the work of the court and promoting its efficiency. At this time the *nisi prius* work of the court was very great. It had original jurisdiction in cases of both tort and contract, concurrently with the Superior Court. It had original and exclusive jurisdiction of suits in equity, of libels for divorce, and of indictments for capital offenses. It had appellate jurisdiction in cases of probate, as well in regard to the facts as the law. Much of Judge Gray's time was, therefore, occupied in presiding at trials. He would sometimes enlarge in later life, when his work had become almost exclusively that of an appellate judge, on the importance of requiring a judge to do some work at *nisi prius*, and if pos-

sible in the country as well as in the city. It is safe to say that he felt the value in his own experience of the work of this sort which he had done. He was highly successful as a trial judge. On his appointment the bar had not doubted his learning but feared that he might be unequal to dealing with questions of fact. He attributed his success largely to a rule he early made and uniformly followed to decide every question of fact submitted to him, on the day he heard the evidence, and to make a note of his conclusion. As a presiding magistrate he dominated the court room, and jury and witnesses and lawyers all felt the compelling power of his personality.

How he found time to do the work which he did in the preparation of opinions is a marvel hardly explicable to one who never saw his daily routine, for not only is the work great in bulk, but none of it is hasty and much of it bears the mark of widely-extended study as well as of careful reflection. In explanation it is to be said that he was gifted with a wonderful physical constitution, and that in his work he realized almost perfectly Goethe's ideal of "*ohne Hast, ohne Rast.*" Pressure of work could not make him accelerate his pace or let an unfinished piece of work go forth. To one watching him work it seemed at first that he did not make any great stride forward in an hour or a day; but the steady march went on hour after hour, morning, afternoon and evening, day after day and week after week. No time was wasted and though opinions were often re-

written, the first draft was always a step towards the ultimate result. He was much aided by the rapidity of his reading and by his prodigious memory not only of decided cases, but of the volumes where they were to be found. When he began the study of the law there were but little over fifty volumes of Massachusetts reports and these he carefully studied. From the time of his admission to the bar till he became a member of the United States Supreme Court, he was concerned either as reporter or judge with most of the decisions of the Massachusetts court. These decisions he did not forget, so that it came about that for most questions of law he not only had the answer ready but a reference to the case where the point was decided, and to the volume where the case was reported.

During the nine years he was an associate-justice he wrote 515 opinions, and during the eight years and four months that he was chief-justice he wrote 852 opinions, making 1,367 opinions in seventeen years and four months. It is worthy of note that during the first eight of the nine years in which he wrote only 515 opinions, he wrote only three opinions less than his share, assuming that the share of the chief-justice was no greater than that of an associate-justice. During the last of these nine years a seventh justice was appointed in the middle of the year, and it would be difficult to make a comparison. The first year that he was chief-justice he wrote 133 out of 484 opinions written by all seven justices, and during

most important opinions. Though he did not state the reason of the request, Judge Gray suspected it, and refused to give any hint. As he said years afterwards in private conversation he did not deem it fitting that the Chief-Justice of Massachusetts should do anything which could make him appear to be an applicant for any place whatsoever. This highly characteristic anecdote shows, as Judge Gray's whole life showed, that the deference which he exacted for his office from others, he paid most punctiliously himself. Judge Clifford, however, did not resign, as had been expected, and though his death took place in the summer, it was not until after President Garfield's assassination. These circumstances gave to President Arthur the power of appointment which he exercised in favor of Judge Gray who was commissioned on December 20th, 1881. The oath of office which he took on January 9th, 1882, by the terms of the constitution of Massachusetts, vacated his office of chief-justice. Thereafter he lived in Washington during the sessions of the Supreme Court, that is from about the first of October until the end of May. He enjoyed thoroughly the work, the associations and the life which his new position brought, but his attachment for his old home remained unchanged. A few years before his death, in 1895, at a dinner of the Harvard Law School Association he said with feeling:

I am a Massachusetts man; I have always been, I always expect to be, so far as my immediate home is concerned, though as a

citizen and an officer of the United States my duties may call me elsewhere.

During the earlier years of his life in Washington, Judge Gray hired a house, but in 1888 he moved into a house which he had built at 1601 I Street. Here he lived for the remainder of his life. The second floor of the house was largely given up to the law library, and those who knew Judge Gray in these years will remember him best in this room, where most of his waking hours not spent in the court room were passed. The walls of the great room were entirely covered with law books except over the mantel where a portrait of Marshall by Jarvis had the place of honor, surrounded by small portraits of the other chief-justices of the United States. A smaller room opened with folding doors from the library. This room also was lined with law books with the exception of the chimney piece, upon which hung a replica of Stuart's well-known portrait of Washington.

On June 4th, 1889, Judge Gray married Miss Jane Matthews, the daughter of his friend and colleague, Stanley Matthews, who had then recently died. She presided over his house during the remainder of his life, and still survives.

About the summer of 1875 Judge Gray began a practice, which he continued until the end of his judicial career, of employing a young graduate of the Harvard Law School as a secretary. At first he paid the expense of this from his own purse, but before he had been many years at Washington the Gov-

or of the expression of them. The fact that his secretary had looked up decisions and digested them did not prevent him from looking them up himself and carefully examining them. So with ideas suggested to him; he would think them all over, and when he had maturely considered the matter, he had formed a conclusion completely his own. He was a careful man, and it may have been a source of satisfaction to him to know that some one else, even though a youth, had been over the same ground and found no pitfall. This possible satisfaction is all that he can have got from much of his secretary's work.

While he sat upon the Supreme Court he bore his full share of its work. He was rarely prevented by illness or other cause from being in his place on the bench, and his opinions, always carefully written, were frequently enriched with carefully-digested statements of all previous important decisions. Before the creation of the Circuit Court of Appeals he also sat regularly on Circuit for some weeks every year. The number of opinions that he wrote while sitting in the Federal Court, four hundred and fifty-one, is much less than the number he wrote in the somewhat shorter period during which he was a Massachusetts judge; but many things must be remembered in making this comparison. The number of judges in Washington being greater than in the State Court, the share of opinions falling to each judge was correspondingly less, but this did not diminish the study necessary to qualify every judge to take part in

the decision of each case. Moreover the length of the papers in the cases at Washington far exceeded the limits imposed by custom in Massachusetts, where records and briefs have always been short. In Washington the records were frequently several hundred, and sometimes several thousand, pages in length. The briefs were of corresponding length, and frequently a number of briefs were presented on behalf of the same party. The great length of the papers, the frequently complicated facts, and the importance of the cases, made necessary for most decisions of the Federal Court a length of statement and of opinion which were seldom appropriate in the State Court. Further, the cases arising as they did all over the United States, involved questions of local law necessarily unfamiliar to a judge from Massachusetts.

While Judge Gray's devotion to the duties of his office did not preclude lighter diversions for his few leisure hours, it did confine his serious work within the limits of judicial labors. Before he became a judge, besides the notes with which he occasionally enriched the volumes he reported, he prepared for Quincy's Reports an elaborate appendix on Writs of Assistance, and notes on slavery in Massachusetts and in England. But while he was on the bench he seldom turned aside from the immediate obligations of his position. An exception to this was the address on the life, character and influence of Chief-Justice Marshall which he delivered at Rich-

mond, February 4th, 1901, at the request of the State Bar Association of Virginia, and the Bar Association of Richmond. He undertook the task with reluctance, and would doubtless have absolutely refused had it not been for his unbounded admiration of Marshall and for his appreciation of the feeling which prompted Virginians to ask him—a Massachusetts man—to deliver the address. At least during the earlier part of his life in Washington it was his intention to retire from the bench at the age of seventy and devote himself to the production of a history of Colonial law and legislation. To this end he bought at auction, as opportunity offered from time to time, a number of volumes of Colonial laws. No man of his time was so well qualified to produce a valuable book on the subject, and it will be hard to find in the future, a successor who shall bring to the work the stock of both historical and legal knowledge, and the power of critical judgment of which Judge Gray was possessed. But when he reached the age of seventy he did not retire. Probably he realized that after nearly forty years of work as a judge, it was not wise to attempt a change.

He sat in court for the last time on February 3d, 1902. In the evening of that day, he had a paralytic shock. His powers of mind were not affected, and his friends encouraged him in the hope that he might recover sufficiently to resume his work. But his physical capacity was much impaired, and though when summer came he moved to Nahant, neither

time nor the sea breezes restored his strength. Accordingly on July 9th, he sent his resignation to the President to take effect on the appointment and qualification of his successor. The resignation was accepted on August 12th, but he died on September 15th, before the appointment of his successor, and therefore still in office.

In appearance Judge Gray was one of the most striking men of his time. He was six feet and four inches tall in his stockings. Unlike most very tall men, all the proportions of his body were on the same large scale. His massive head, his large but finely-shaped hands, and the great bulk of his frame, all seemed to mark him as one of a larger race than his fellows. The habitual expression of his face was serious, but if anything appealed to his sense of humor his features would light up with almost boyish merriment. He relished a joke or a good story, but it was not well to attempt in his presence to be humorous at the expense of the court of which he was a member, or upon a topic which seemed to him to require serious treatment.⁸

⁸ It may be of interest to note that besides a number of photographs taken at various times, there exist the following representations of Judge's Gray's appearance:

a. A portrait by Benjamin Constant, life-size, three-quarters length, sitting, taken when he was about sixty-eight.

b. A bas-relief representing him in profile, sitting, three-quarters length, by St. Gaudens, taken in the spring of 1901.

c. A portrait by Horace Vernet, life-size; group of himself when about four years old, his sister about two, and a setter-dog.

d. A drawing at about the age of thirteen by Cheney, life-size, head and shoulders.

Judge Gray was a religious man, a member of the Episcopal Church, and a regular attendant at its services. In Boston he was a member of Trinity Church, and an intimate friend of Phillips Brooks. His temper was conservative in matters of church as well as of state, and a reference to the revised version of the Bible was likely to draw from him a vigorous expression of his opinion that the version of King James was the Bible of the English-speaking nations.

The legal influence of a judge though most obviously and most extensively exerted by his reported opinions, is not confined to that channel. A judge, and especially a chief-justice, may produce important and lasting results by his conduct of cases at *nisi prius*, and by controlling the rules of practice in his court.

Judge Gray was a strict disciplinarian as a presiding judge in Massachusetts. Indeed by many lawyers he was considered a martinet, and stories are still current in Boston of the severity with which he rebuked even slight offenses against the decorum of the court room. One who has occupied the

e. A picture taken abroad by Lauder, representing him at about the age of six, with his father. The figures here are only about one-quarter-size, and the figure of the boy is not important.

All these belong to Judge Gray's widow except the Cheney drawing, which belongs to his sister Miss Harriet Gray, and the picture by Lauder, which belongs to his brother Russell Gray, Esq. Of the two representations in advanced life, the Gray family do not consider the painting very satisfactory, but the bas-relief is generally agreed to be one of the most successful of St. Gauden's works in that style, as well as an excellent likeness.

position of secretary to him cannot attribute any undue severity which occasionally he may have manifested to a harsh temper or a lack of patience. He was of most genial disposition and except where he felt the dignity of his office was in question, he was a patient man. The key to any apparent contradiction in his character in this respect, as indeed the key to his whole life is found in his devotion to his office. Few men can have given themselves to the priesthood with such absolute devotion or with such full faith in the sacredness of their chosen profession as Judge Gray showed towards his judicial duties. In his youth as reporter of decisions he had sat below the court over which Chief-Justice Shaw presided, a man for whom throughout his life he retained the highest admiration. Shaw was not a man to be approached in a free and easy manner. In his day the dignity of the Supreme Judicial Court of Massachusetts was maintained not only by the soundness of its decisions but by the decorum of its proceedings. It may safely be said that the dearest wish of Judge Gray while he presided over the court was that it should suffer no loss of prestige during his term of office. He was not a man who would consciously imitate another, but that his early association with Shaw was influential in forming his ideal of what was fitting in the administration of justice seems highly probable; and there can be no doubt that his own authority and example did much towards the preservation of the orderly and dignified

methods of administering justice which prevail in Massachusetts courts.

It is characteristic of his attitude of mind that neither prejudice nor sympathy seemed to affect him in the least. He was a man of strong opinions, and some of the opinions which he would express when off the bench, as to persons and things, were so far based on feeling rather than reasoning that they might be termed prejudices. But in the consideration of causes before him, it never seemed necessary for him even to be on his guard against prejudices; his mind was working on a higher plane. Similarly hard cases did not make bad law with him. He was laying down the law of the land, and his mind addressed itself so absolutely to that duty, that the more personal phases of the litigation sank out of sight.

The development of the doctrines of equity in Massachusetts was very slow. The discretionary powers characteristic of equity jurisprudence were regarded with distrust for many years, and statutes designed to enlarge the equity powers of the court were narrowly construed, for the judges who construed them had been trained as common law lawyers, and frequently lacked not only the desire but the learning essential to fit the doctrines of Hardwicke and Eldon into the law of Massachusetts. As late as 1855 it was said by the court in an important case:⁹

⁹ Per Justice Dewey, in *Harvard College vs. Society for Promoting Theological Education*, 3 Gray's Reports, 280.

The exercise of any chancery power by this court, beyond that of relief in cases of mortgages and penal bonds, is of comparatively recent origin, and has ever been exercised with a cautious hand, and strictly with reference to the class of cases named in the statutes.

Judge Gray was a good equity lawyer. His familiarity with the English books enabled him to be of great service in the development of the powers of the court, both before and after the statute of 1877, which conferred upon it full equity jurisdiction.

Not only was he serviceable in regard to questions, which may properly be called questions of law, but matters of practice received his close attention. As reporter he had early acquired an unusually exact knowledge of such matters, and even minute details were always interesting to him. He was assiduous to improve procedure, and to make it uniform throughout the state, and accomplished much in these directions.

In any consideration of the written work that Judge Gray has left behind him in the reports, attention is first attracted by the length of his judicial career and the bulk of his writings. For thirty-eight years he was a judge and, during that time, his opinions are reported in forty-three volumes of the Massachusetts Reports and in eighty-one volumes of the Supreme Court of the United States. Throughout this period he always did his full share of the work of the court of which he was a member, and frequently much more than his share. This long

service in two important courts necessarily involves wide influence upon law and legal thought—through channels which cannot be directly traced as well as through more obvious courses.

Judge Gray early won a wide reputation for his learning, and this reputation was fully deserved. It is probably not too much to say that he was the most learned American judge of his generation. His early legal training was thorough, his memory tenacious, and throughout his career he was accumulating further stores. How much his exact and ready knowledge of legal theory and decisions meant to his colleagues in consultation it is not easy to say, but that it was a constant aid and frequently a safeguard is not too much to hazard. Not only was his knowledge of legal principles and decisions great, but his acquaintance with legal literature and bibliography was most unusual. This was both the result of years of laborious research, and a cause of the success with which his researches were crowned—a success sometimes so striking as to seem accidental to one who did not know the man. Two illustrations, both taken from his last years, may be given. As part of his address on Chief-Justice Marshall at Richmond in 1901, he read a letter in which Marshall gave briefly an autobiography. Much as Marshall had been written about both by historians and by lawyers, it was left for Judge Gray while preparing an occasional address, to bring to light this important letter, which he found in an obscure pam-

phlet printed in Ohio more than fifty years before. The other incident relates to Judge Gray's opinion in *United States vs. Wong Kim-Ark*,¹⁰ and may best be told in the words of J. Hubley Ashton, Esq., at the meeting of the Washington Bar Association held to commemorate Judge Gray's life and work:

There was cited in the argument for the appellee in that case a paper of remarkable ability on the "*Alienigenæ of the United States*," published many years ago in the *American Law Register*, which had always and universally been attributed by lawyers and judges to Horace Binney, although his name was not appended to the article. As one of the counsel for the appellee, I made considerable effort to ascertain before the argument whether the great lawyer of Philadelphia had ever formally acknowledged this paper as his own, but the search for information on the subject was unavailing. My surprise was almost humiliating, I remember, when I saw in the opinion of the court, delivered by Mr. Justice Gray, a passage with a note, from what was described by him as the second edititon of this paper, "printed in pamphlet form at Philadelphia with a preface bearing Mr. Binney's signature, and the date of December 1st, 1853," accompanied by the following observation of the learned judge: "This paper without Mr. Binney's name, and with the note in a less complete form, and not containing the passage last cited, was published (perhaps from the first edition) in the *American Law Register* for February, 1854." I was naturally curious to know where and how Mr. Justice Gray had found this rare pamphlet, no copy of which appeared to be in any department of the Library of Congress. He told me that although he had no doubt from internal evidence and otherwise that the paper referred to was the authentic work of Mr. Binney, he was indisposed to cite it as such in the opinion of the Supreme Court upon mere tradition or general belief on the subject, and that

¹⁰ 169 *United States Reports*, 649.

no precedents on which to lean and for the excellent original reasons which he had to give. I think Judge Gray's fame, on the whole, would have been greater as a man of original power if he had sometimes resisted the temptation to marshal an array of cases, and had suffered his judgments to stand on his statement of legal principles without the authorities.

Judge Gray wrote but one dissenting opinion during the seventeen years that he was on the state bench. It was in the case of *Hinckley vs. Cape Cod Railroad*.¹² Judge Marcus Morton concurred in the dissent. Judge Gray was a judge with strong convictions as to law, and the reasons why he so seldom dissented are probably twofold. In many cases his reasoning and learning were doubtless sufficient to bring his associates to adopt his view. Where this was not the case, he generally refrained from expressing his own opinion. He believed that frequent dissenting opinions impair the respect in which a court is held and the weight of its decisions. In the Supreme Court of the United States, the chance for dissent is in the nature of the case greater than in any state court. Not only are the judges residents of different states, trained in different schools of legal thought and each more or less permeated with the peculiar legal doctrines of his own locality, accepted as undoubted and almost necessary truth at home, yet regarded as erroneous in the homes of brother justices, but they so differ in fundamental political theory that on certain classes of constitutional questions

¹² 120 Massachusetts, 257, 264.

disagreement is almost inevitable. Nevertheless during the twenty years he sat with the court he expressed dissent in but fifty-one cases. In ten of these he wrote dissenting opinions. It is probable that in many of these cases, if he had been the only dissenting judge he would not have stated his views, following his general rule not to announce his dissent unless from the great importance of the question, he deemed it his duty to do so.

Judge Gray was educated before the days of specialists. The variety of the cases with which he necessarily had to deal as a judge in Massachusetts gave him little opportunity if he had the desire to devote himself to a narrow field. But this variety was pleasing to him, for his learning in the law was encyclopædic. It is impossible, therefore, to single out one or two departments of the law in which he excelled to the exclusion of others, further than to say that he was peculiarly fitted to deal with any case which involved the history of a legal doctrine. The law of property, mercantile and admiralty law, constitutional and international law, were all subjects of the same enthusiastic interest and deep study.

A few of the most important cases in which Judge Gray wrote the opinion of the court should be mentioned. His first opinion was delivered in the case of *Pomeroy vs. Trimper*,¹⁸ an action of replevin. The principal question decided in the case was that the writ need not contain a statement of the value of

¹⁸ 8 Allen's Reports, 398.

of the bill in question sought to maintain an action on the ground that he was the beneficiary of the defendant's promise, Judge Gray, in a later volume of the Massachusetts Reports,²³ wrote the opinion of the court to the effect that in spite of broad language used in earlier Massachusetts decisions such promises were not enforceable, save in a few very exceptional cases.

In *Waters vs. Stickney*,²⁴ the court held that the probate court might admit to probate a codicil to a will, though the will had previously been admitted to probate and the time for appealing from the decree admitting it had elapsed. In writing the opinion of the court, Judge Gray examined both English and early Massachusetts authorities. *Bronson vs. Coffin*,²⁵ upheld the validity of an easement imposing an obligation to fence upon the owner of adjoining land. *Low vs. Elwell*,²⁶ held that the owner of real estate is not liable for the use of such force as may be necessary to eject a tenant at sufferance. In *Hill vs. Boston*,²⁷ the court held that a city was not liable for an injury to a child caused by a defective staircase in a public schoolhouse. In considering the question Judge Gray examined carefully the authorities governing the liability of municipal corporations for negligence. In *Greenfield Savings Bank vs. Stow-*

²³ 107 Massachusetts Reports, 37.

²⁴ 12 Allen's Reports, 1.

²⁵ 108 Massachusetts Reports, 175.

²⁶ 121 Massachusetts Reports, 309.

²⁷ 122 Massachusetts Reports, 344.

ell,²⁸ the court held that an alteration of the amount of a promissory note from sixty-seven dollars to four hundred and sixty-seven dollars rendered it void even in the hands of a *bona fide* purchaser for value, though the alteration was made possible by spaces left in the document when signed by the makers. Judge Gray in his opinion expressed disagreement with the well-known English case of *Young vs. Grote*,²⁹ unless limited strictly to its peculiar circumstances. It is worthy of notice that the House of Lords has subsequently taken the same position, and substantially overruled *Young vs. Grote* in *Scholfeld vs. Earl of Londesborough*.³⁰ In *Gorham vs. Gross*,³¹ the court held that one who had a party wall built was liable to the adjoining land-owner for damage caused by the careless construction of the wall, even though it was constructed by an independent contractor. Judge Gray relied on the leading English decision of *Rylands vs. Fletcher*,³² and considered various applications which had been made of the doctrine of that case. In *Milliken vs. Pratt*,³³ it was held that a written contract of guaranty signed by the defendant, a married woman, in Massachusetts and sent by mail to Maine, where it was assented to and acted on, was made in Maine, and was to be

²⁸ 123 Massachusetts Reports, 196.

²⁹ 4 Bingham's Reports, 253.

³⁰ (1896) Appeal Cases, 514.

³¹ 125 Massachusetts Reports, 232.

³² Law Reports, 3 House of Lords' Cases, 330.

³³ 125 Massachusetts Reports, 374.

governed by the law of that state, so that as married women had capacity in Maine to contract, the defendant was liable on the guaranty though she had been continuously domiciled in Massachusetts, where at that time married women could not contract. *Clapp vs. Ingraham*,³⁴ decided that a general power vested in a debtor is in equity to be treated as assets, subject to the demands of his creditors in preference to the claims of his voluntary appointees or legatees.

In Judge Gray's work at Washington, his constitutional opinions naturally engage attention first. Of these decisions in general it may be said that he took a large view of the powers of government, not only of the United States, but also of the states so long as they did not infringe upon the powers entrusted by the Constitution to Federal control. His first important opinion was one of his few dissenting opinions. It expressed the dissent not only of himself but of Chief-Justice Waite and Justices Bradley and Woods, in the case of the *United States vs. Lee*.³⁵ The majority of the court held that the Circuit Court had jurisdiction to try the title of the United States to the estate of Arlington in an action of ejectment against the officers of the United States who were in possession. The minority held that this was in effect an action against the United States and could, therefore, not be maintained. Judge Gray was on familiar ground for the question involved was very

³⁴ 126 Massachusetts Reports, 200.

³⁵ 106 United States Reports, 196.

like that with which he had dealt in *Briggs vs. Life Boats*.³⁶ He again dealt with a similar point in *Belknap vs. Schild*.³⁷

The next noticeable opinion was in the last of the Legal Tender Cases, *Juilliard vs. Greenman*,³⁸ which upheld the power of Congress to pass a statute in time of peace, making treasury notes legal tender. Judge Field alone dissented. In *Head vs. Amoskeag Manufacturing Company*,³⁹ the mill acts of Massachusetts which authorize the flowing of lands for mills by right of eminent domain, were held not to violate the Fourteenth Amendment. In *Van Brocklin vs. Tennessee*,⁴⁰ it was held that a state not only could not levy taxes on land while owned by the United States, but that after the United States sold the land, taxes assessed against the land during the period of governmental ownership could never be levied upon the land whoever might be the owner at the time of the levy.

He wrote the dissenting opinion in the familiar case of *Leisy vs. Hardin*,⁴¹ which held that the Iowa law prohibiting the sale of intoxicating liquors was unconstitutional so far as it applied to the sale of liquor in the original packages in which it had been imported into the state. Judge Gray was of the opin-

³⁶ 11 Allen's Reports, 157.

³⁷ 161 United States Reports, 10.

³⁸ 110 United States Reports, 421.

³⁹ 113 United States Reports, 9.

⁴⁰ 117 United States Reports, 151.

⁴¹ 135 United States Reports, 100.

ion that the Iowa statute was a rightful exercise of the police power of the state. Almost immediately after the decision in *Leisy vs. Hardin*, Congress passed the Wilson Act, which provided that intoxicants "upon arrival" in a state should "be subject to the operation" of its laws. Judge Gray concurred in the judgment of the court upholding the constitutionality of the Wilson Act in *in re Rahrer*.⁴² In *Rhodes vs. Iowa*,⁴³ the court held, however, that the Wilson Act did not authorize a state statute prohibiting a carrier from delivering to the consignee intoxicants brought from without the state. Judge Gray, with whom Judges Harlan and Brown concurred, dissented on the grounds that the words of the Wilson Act authorized the state to make transportation beyond the state line illegal. In *Austin vs. Tennessee*,⁴⁴ the minority view triumphed to some extent at least. The case held that the Legislature of Tennessee might constitutionally limit or prohibit the sale of imported cigarettes after they had been taken from the original packages or were no longer in the hands of the original importer. Chief-Justice Fuller and Justices Brewer, Shiras and Peckham dissented. To these decisions should be added that of *Schollenberger vs. Pennsylvania*,⁴⁵ in which Judge Gray wrote an opinion dissenting from the decision

⁴² 140 United States Reports, 545.

⁴³ 170 United States Reports, 412.

⁴⁴ 179 United States Reports, 343.

⁴⁵ 171 United States Reports, 1, 25.

holding invalid a statute prohibiting the importation of oleomargarin into the state, and its sale in the original package. Judge Harlan concurred in the dissent. In several cases Judge Gray affirmed the validity of state statutes imposing a tax upon corporations, delivering the opinion of the majority of the court in *Pullman's Car Co. vs. Pennsylvania*,⁴⁶ and *Massachusetts vs. Western Union Telegraph Co.*,⁴⁷ and concurring with the majority in *Adams Express Co. vs. Ohio*,⁴⁸ and *Adams Express Co. vs. Kentucky*.⁴⁹

In *Logan vs. United States*⁵⁰ (following the doctrine of *Neagle's case*,⁵¹ in which it had been held that an assault upon a Federal judge was a breach of the peace of the United States as distinguished from that of the state where the assault occurred) he delivered the opinion of the court that a citizen of the United States in the custody of marshal under a commitment to answer for an offense against the United States has a constitutional right to be secured against lawless violence. In *in re Quarles*⁵² this doctrine was extended to protect citizens who were about to inform a United States marshal of a violation of internal revenue laws. In the Chinese Exclusion

⁴⁶ 141 United States Reports, 18.

⁴⁷ 141 United States Reports, 40.

⁴⁸ 165 United States Reports, 194.

⁴⁹ 166 United States Reports, 171.

⁵⁰ 144 United States Reports, 263.

⁵¹ 135 United States Reports, 1.

⁵² 198 United States Reports, 532.

Cases,⁵³ Judge Gray delivered the opinion of the majority of the court upholding the act of May 5th, 1892, prohibiting the immigration of Chinese and providing for the registration of Chinese laborers already in this country. In *Sparf vs. United States*,⁵⁴ he delivered as a dissenter his longest opinion. The majority sustained a conviction for murder in which the judge at the trial instructed the jury that there was no evidence warranting a conviction for a lower offense than murder and that the jury must be guided by the law laid down by the court. Judge Gray, with whom Judge Shiras concurred, held that if the jury "are satisfied in their consciences that the law is other than as laid down to them by the court, it is their right and their duty to decide by the law as they know or believe it to be."⁵⁵ In so holding Judge Gray was elaborating a doctrine expressed by him thirty years before in a note to Quincy's Reports on the powers and rights of juries.⁵⁶ In *New Orleans Waterworks vs. Louisiana Sugar Co.*⁵⁷ and in *Central Land Co. vs. Laidley*,⁵⁸ he dealt with the clause of the Constitution which forbids the impairment of the obligation of contracts.

In *Pollock vs. Farmers' Loan & Trust Co.*,⁵⁹ he was

⁵³ 149 United States Reports, 698.

⁵⁴ 156 United States Reports, 51.

⁵⁵ Page 172.

⁵⁶ Pages 553-572.

⁵⁷ 125 United States Reports, 18.

⁵⁸ 159 United States Reports, 103.

⁵⁹ 157 United States Reports, 429; 158 United States Reports, 601.

one of the majority of the court which held the income tax of 1894 unconstitutional. In *United States vs. Wong Kim-Ark*,⁶⁰ he delivered the opinion of the court construing the first clause of the fourteenth amendment which declares that "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the state wherein they reside." A son born of Chinese parents in the United States was held to be a citizen of the United States, though his parents were not citizens and, under the laws of their own country and of the United States, could not become such.

In *Capital Traction Co. vs. Hof*,⁶¹ in considering the constitutionality of statutes providing for the trial of small causes before Justices of the Peace, he had to deal with the meaning of the seventh amendment which declares that "no fact tried by a jury shall be otherwise reëxamined in any court of the United States, than according to the rules of the common law." This necessarily led to an examination of the whole subject of trial by jury at common law and under the Constitution. *Atherton vs. Atherton*,⁶² and *Bell vs. Bell*,⁶³ and *Streitwolf vs. Streitwolf*,⁶⁴ involved important questions as to the validity of constructive service upon a defendant

⁶⁰ 169 United States Reports, 649.

⁶¹ 174 United States Reports, 1.

⁶² 181 United States Reports, 155.

⁶³ 181 United States Reports, 175.

⁶⁴ 181 United States Reports, 179.

without the state in libels for divorce. These decisions have been supplemented since Judge Gray's death by the case of *Andrews vs. Andrews*.⁶⁵

But it is not only his constitutional opinions that deserve attention. Two of his greatest opinions were on topics of international law. *Hilton vs. Guyot*,⁶⁶ involved the question whether a judgment recovered against an American citizen in France by a court having jurisdiction over his person created an absolute obligation enforceable in this country. Judge Gray, delivering the opinion of the majority of the court, held that a foreign judgment was given effect only by reason of comity, and that inasmuch as an American judgment could not be enforced in France without reëxamination of the merits of the case, so when the situation was reversed an American court, while treating the French judgment as evidence of the plaintiff's right, should not treat it as conclusive. Four judges dissented. *The Paquete Habana*,⁶⁷ involved the validity of the seizure by a United States cruiser, in time of war, of two Spanish fishing smacks. The court held, though three judges dissented, that it was a rule of international law that such vessels while honestly pursuing their business were exempt from capture as prize of war. The case of *Liverpool and Great Western Steam Co. vs. Phenix Insurance Co.*,⁶⁸ where he considered what law gov-

⁶⁵ 188 United States Reports, 14.

⁶⁶ 159 United States Reports, 113.

⁶⁷ 175 United States Reports, 677.

⁶⁸ 129 United States Reports, 397.

erned the contract under consideration should also be mentioned in this connection.

His admiralty opinions deserve special mention, though only a few can be selected from a considerable number. Admiralty liens he considered in *The J. E. Rumbell*,⁶⁹ *the Glide*,⁷⁰ and *the John G. Stevens*;⁷¹ general average in *Ralli vs. Troop*.⁷² In *Workman vs. New York*,⁷³ he expressed besides his own dissent that of three other members of the court from the decision of the majority that the city of New York was liable in a libel *in personam* for a negligent injury caused to the plaintiff's vessel by the collision with it of a fire boat belonging to the city. Judge Gray had fully considered in *Hill vs. Boston*,⁷⁴ the liability of municipalities at common law for the consequences of negligence and started his opinion with an overwhelming showing of authority that at common law the plaintiff could not recover, and proceeded thereafter to argue that the reasons on which the doctrine of the common law was based applied with equal force to libels *in personam* in admiralty. In *Homer Company vs. La Compagnie Generale Transatlantique*,⁷⁵ he wrote the opinion of the court that in an action at common

⁶⁹ 148 United States Reports, 1.

⁷⁰ 167 United States Reports, 606.

⁷¹ 170 United States Reports, 113.

⁷² 157 United States Reports, 386.

⁷³ 179 United States Reports, 552.

⁷⁴ 122 Massachusetts Reports, 344.

⁷⁵ 182 United States Reports, 406.

respondingly tenacious of them when formed. He always wished the opinions of the Court to be placed upon such grounds as, not going beyond what the decision of each case required, should afford a firm foothold in determining future controversies.

There can be little doubt that when he wrote these words Judge Gray was not only describing a friend for whose character and work he had a high admiration, but was also expressing his own ideal. That his long and ardent devotion of the great abilities with which he was endowed to his judicial labors should have enabled him to realize this ideal in large measure is no cause for surprise, and those who know his work best will be the most ready to assent to the added words of Chief-Justice Fuller:

Mr. Justice Gray was preceded as the head of the Supreme Judicial Court of Massachusetts by Lemuel Shaw; he was preceded on this bench by Joseph Story and Benjamin Robbins Curtis. Eulogy can rise no higher than the expression of the conviction that he will be ranked with them without appreciable interval.

WILLIAM GARDINER HAMMOND.

WILLIAM GARDINER HAMMOND

From a bronze bust by R. R. Bringhurst in the Law Library of the
State University of Iowa at Des Moines.

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WILLIAM GARDINER HAMMOND.

1829-1894.

BY

EMLIN M'CLAIN,

*Justice of the Supreme Court of Iowa.**

ALTHOUGH Doctor Hammond was born, and his boyhood was spent in Newport, Rhode Island, his active period of study and practice of the law as a profession was in Brooklyn and New York City, and the later years of his life during which he did some of his most important work were passed in St. Louis, Missouri, where he died, it may justly be said that Iowa was the home of his maturity, and that his life here was not only more fertile in the development of those activities for which he would wish to be remembered, but also attained a more pronounced local significance than the portions of it which preceded or followed. He counted his coming from the east to Iowa as the great event, the turning point in his life, and he always looked back to the portion of his life which he lived

* In Iowa the justice of the Supreme Court, whose commission will first expire, is chief-justice. Justice M'Clain, when he wrote this essay, was chief-justice. His commission afterwards expiring, he was reelected, becoming, under the rule above referred to, an associate-justice.—Ed.

in Iowa as that which afforded him the greatest satisfaction in the retrospect, and had given scope to the highest exercise and enjoyment of his peculiar abilities; so that he would prefer, I am sure, if his choice could be consulted, to be thought of as a citizen of Iowa. It is with this view that the following sketch of his life is presented, with emphasis on what he was and did here, though the foundation of his character and education were laid in the east, and his most matured and renowned work as a law scholar, I mean his edition of Blackstone's Commentaries, was conceived and carried to completion in St. Louis. Here, too, were formed the family relations and the personal associations of his mature years, which he most highly prized; and the State University of Iowa, of whose law department he was the first head and the most illustrious teacher, was selected by him before his death as the beneficiary of his remarkable private collection of books, relating to the history of the Roman civil law and the early English common law.

Something more should be said, however, by way of justification, for the selection of Doctor Hammond as a representative of Iowa, in a work on the Lives and Legal Influence of America's Greatest Judges and Lawyers, for he was not the judge of any court, nor was he for any considerable length of time, nor with any notable cases to his credit, a practicing lawyer in Iowa. His significant legal work in this state was as a scholar, a teacher and an author. A schol-

ar's reputation is at best but limited and transitory unless the results of his labors are perpetuated in some great achievement of authorship, and Doctor Hammond published while in Iowa but little which was intended as a permanent contribution to the literature of the law. On the other hand, the work of a law teacher though leading to no considerable public renown may afford the basis for a solid and enduring professional reputation through at least one generation, even greater than that of a judge, a law-maker or an author. Such an influence Doctor Hammond exercised, as is well recognized, on the jurisprudence of this state through the students who came under his instruction, and it is this influence which entitles him, I think, to be counted among the "Judges and Lawyers" who have most materially contributed to its development. But he also has a definite place in the jurisprudence of Iowa by reason of having prepared a digest of the decisions of her Supreme Court, and assisted as a commissioner in the preparation of the Code of 1873 in which the laws of the state were compiled in systematic and scientific form, and which has remained to the present time the substantial codification under official authority of the practice and, to a considerable extent, the substantive law of the state. It is submitted that these labors and achievements entitle Doctor Hammond to be considered not only as identified fully with the history of Iowa but also as occupying a really prominent place among those who have

worthily contributed to the upbuilding of the commonwealth.

William Gardiner Hammond was born at Newport, Rhode Island, on May 3d, 1829. The Hammond family came to England about the time of the Norman Conquest, and from England to Rhode Island about 1710, when Joseph Hammond settled at North Kingston on Hammond Hill, still owned by his descendants. About 1715 he married a daughter of William Gardiner of Narragansett, and this combination of family names several times occurs in the direct line of descent which included, not only large landowners, but a judge (who was also Commissioner-General in the Revolutionary War, a prominent merchant and a member of the Assembly) a merchant and ship-builder (who was also surveyor of customs under President Madison), and a lawyer (also surveyor of customs, under Presidents Jackson, Van Buren, Harrison, Tyler and Polk) who was the father of the subject of this sketch. On his father's side he was descended also from Samuel Gorton, founder of Warwick and president of that colony. His father was a lawyer of extensive practice, a popular political leader of the Democratic party, a talented orator and an enthusiastic student in the classics. His mother was Sarah Tillinghast Bull, a descendant of Governor Henry Bull of Rhode Island, who built the first stone house in Newport, one of the two oldest houses in New England which are still standing. She was a very handsome

woman, a great belle of her time, and a woman of literary tastes. Both on the father's and on the mother's side he was by inheritance an Episcopalian, and remained identified with that church throughout his life. This must suffice as a brief account of an ancestry as distinguished as any to be found in the state of his birth, including the names of great governors, great preachers, great leaders, and great land-owners and merchants.

The boy's letters to his father which have been preserved show precocity in the use of language and a certain ripeness of thought. When he was in Wickford at school at fifteen years of age he wrote his father to buy and send him regularly, copies of the "Boston Nation" or some other good Boston or New York paper, and take the cost out of his allowance, and when his father had evidently furnished him the papers without charge, he was punctilious in keeping and returning them. Indeed his particularity in keeping account of expenditures seems to have been unusual, though entirely voluntary, and indicates a careful training. These letters to his father are more important, however, as showing from this time until his father's death, the highest degree of confidence, respect and affection. There was evidently complete sympathy and comradeship, and of the most valuable kind so far at least as the boy was concerned, for a considerable part of his preparation for college was made under his father's immediate instruction. After leaving the school at

Wickford, he was at home for a time under the immediate tuition of a Judge Joslen who took private pupils but was evidently a somewhat unsatisfactory instructor. On the discontinuance of this school by reason of Joslen's appointment as postmaster, he undertook to carry on his studies entirely with his father but soon was put, for Latin and Greek, under the instruction of "Domine" Thayer, as he constantly calls him, a Congregational minister who conceived for him and inspired in him a great affection which lasted throughout both their lives, for the Reverend Doctor Thayer, who during the remainder of his life was pastor of the Congregational church in Newport, active and afterwards emeritus, died only one month before the death of Doctor Hammond himself, and there was correspondence between them at intervals until their later years. Domine Thayer inspired in young Hammond an intense religious enthusiasm as well as a devotion to classical learning, an enthusiasm which would have seemed likely to incline the pupil to the profession of the ministry had there not been developed in his mind a certain distaste for the claims of a purely personal religion, by reason of its antagonism as he thought to the search for absolute and unbiased truth. In later years he wrote:

I have not the least hesitation in owning that very often the happiness and the beneficial effect of such a belief [as his friend expressed] in a personal God and in His special providences and answers to prayer, affect me so strongly that I would give any-

thing to enjoy them myself, except that which I have no right to give away, my convictions of truth, and my determination to follow its teachings whithersoever they may lead me. . . . If it were proved to me that there were ninety-nine chances out of one hundred of the existence of hell, I might, from selfish motives, try to persuade myself to act as if I were thoroughly convinced of its reality, but I could not believe it as I believe the truths of history, to say nothing of mathematics, and as the argument on these subjects really stands, it seems to me degrading for an accountable being, even if accountable only to himself, to profess a belief founded on such a calculation. . . . Here it strikes me is the radical difficulty of "justification by faith" as a religion for the world. The moment thought becomes really free it sees the arguments *con* as well as the arguments *pro* and cannot choose to believe against the weight of argument without infidelity to all that is best and highest in man's nature.

But to conclude all that need be said of the religious side of Doctor Hammond's nature he was throughout his boyhood as well as in after years a remarkably conscientious student of the Bible, having read it through in course with commentaries, making memoranda of his own, within the two years preceding his entering college. He had always the greatest respect for the religious convictions of others and was always an upholder of Christianity and the church.

During this preparation for college young Hammond was esteemed by his instructors as a remarkably proficient and industrious student of the classics, and also of French. His acquirements were evidently very much more extensive and thorough than is usual at this day, at least, in our preparatory schools,

and he had a genuine devotion to his studies. His general reading, especially in history, was also voluminous. He had a membership in the old Redwood Library (a collection of 4,500 volumes) and his memoranda of books taken out and books which he went to the library specially to read show a remarkable taste for learning. It will be sufficient to suggest that the voluntary absorption in Paley's *Natural Theology*, Carlyle, Alison's *History of Europe*, Erasmus on Folly, Doctor Chalmer's *Sermons*, and Doctor Arnold's *Life and Correspondence* indicate literary interests uncommon in a youth before entering college at the age of seventeen. With his father, in the evenings, he read all of Gibbon's *History* and a part of Lingard, and at the library for some reason he dug into *Domesday Book*. But his reading was not entirely serious, for his list of books shows many of a miscellaneous character, although so far as it appears, he did not then nor in later years indulge himself to any great extent in the reading of fiction.

Though thus evidently possessing unusual maturity of mind he was at the same time very much a boy. He was extremely social in his tastes and companionable with his fellows; he played quoits and football, skated, ran races, danced, took long walks with companions (walking was throughout his life a favorite relaxation), and rowed and sailed continuously with the greatest delight. He sawed and split the family wood and contracted with his father to saw the wood for his office at the custom house. His associations

with his father at the custom house and in the general life about a port then of considerable activity, although its commerce was already declining, made him familiar with shipping and the sea, and everything connected with the life of the sea and its experiences always had for him the greatest fascination.

He was already interested in politics and his enthusiasm over the election of President Polk, sympathy with Governor Dorr and indignation at the proceedings of the Algerines, are extremely entertaining. But when he was practicing law in Brooklyn he became an equally ardent Republican and was in substantial sympathy with that party through the rest of his life though he was never a partisan and in later years apparently took no active interest in party politics.

With reference to his future education he had hoped that the succession of Polk to the presidency, of whose prospect his father had been an ardent supporter, would secure for him admission to West Point, but after being disappointed in this, his thoughts turned toward Yale which he hoped to enter as a freshman with one of Domine Thayer's pupils to whom he had become greatly attached. A financial emergency, however, sent his friend off to Cuba to become superintendent of a sugar plantation and young Hammond was kept a year longer under the Domine and then went to Amherst, entering as a sophomore in September, 1846. Here he at once formed warm, strong and lasting friendships with

William J. Rolfe, the afterwards noted Shakespearean scholar, who was his chum throughout his college life, and Julius H. Seelye, who became president of Amherst College and was for one term a member of Congress. Hammond was early solicited to become an Alpha Delta Phi, that fraternity being the leading one in the institution at the time, but the grounds of the solicitation seem to have been unfortunately phrased, for he says in a letter that when he first came they told him he could not get into good society unless he joined that fraternity, which was the chief reason that kept him from joining, for "I despised then as now any such mean interference in matters extraneous, and I felt that if I could not win friends by my own merits I would not by a society badge." He did win friends both in that fraternity and out of it and subsequently became a member of Psi Upsilon and also a member of the "Academia" a literary society. But the society in which he found greatest delight and to which he looked back with the most pleasant recollections was one still more secret, consisting of five members, the existence of which was unknown beyond its own membership, which embraced Seelye, Rolfe, Joseph D. Poland and Charles D. Lothrop, besides himself. They called themselves Zetas or Zelotes. To each was assigned a special supervision over one great branch of learning; Seelye over metaphysics, Rolfe over belles-lettres, Poland over rhetoric, Lothrop over history and Hammond over languages. Rolfe has

written an account of this society in which he says:

Each man while having special duties and responsibilities in his department was to take part in discussions on the work of the other departments and also in miscellaneous exercises and criticisms. Criticism indeed was the main feature of our work, criticism of each others' writing and speaking, of our college studies and books of reading, of the questions of the day, and whatever else we were interested in. We met once a week for an hour and a half as a rule; and being so few in number each of us had to do far more work than we could have had the opportunity of doing in the other literary societies.

This circle furnished three of the five members of the first editorial board of a college literary magazine, *The Indicator*, the plan of which Hammond seems to have originated. He was the Editor-in-Chief and chairman of the board.

Young Hammond seems unquestionably to have been regarded as the best classical scholar in the college and his love of the study of language and especially of philology continued through life. He professes to have had an aversion to mathematics but as a matter of fact, though his preparation in mathematical studies was defective, he made up geometry in a short period of special study and took the course in calculus which was first introduced in the institution while he was a student. He was therefore not incapable of mathematics and did some rather advanced reading on that subject, but was not specially attracted by it. He was also interested in astronomy and mineralogy, the only branches of natural science which were included in the curriculum. That his

Webster commenced. His plea lasted about two hours. I imagine it was by no means one of his great efforts; indeed as I have said, he showed this throughout. He had just recovered from a fit of sickness, and probably thought this, too, rather a small matter, his fee being *only* \$2,500. Besides, he was in a small country town; though his audience indeed was a noble one. . . . His argument was clear and simple; the fallacies of his opponent were exposed, and his mass of authorities adduced with the air of a man who *knew* what he was about, and when once in a while a sly stroke of satire set the court room in a roar, it came, not as an achievement, but just as if it were all in the natural course of events, and *couldn't* help coming in just then. He displayed throughout the whole the most perfect coolness and ease. Never excited, never off his guard, he went on with the clearness and accuracy of a proposition in Euclid. Sometimes too in a joke, or a slight touch of pathos, or some other embellishment of the kind, he would show of what he was capable. Choate's speech filled me with an impression of *brilliancy*; but Webster's seemed to weigh down the mind with the idea of immense *power*. Though not in the most favorable situation for watching his countenance, I could not but notice the great change that came over it after he began to speak. The heavy, dull, bloated expression fled, and his face became clear and animated; he looked almost ten years younger; his voice became more distinct and rich, without losing any of its depth; his form seemed to grow more erect and vigorous; the whole man changed, yet there was no excitement; he remained as perfectly master of himself as before. In his appearance he reminds me of Dr. Wayland [President of Brown University and a great pulpit orator], not so much in features as in general air and tone; he has Wayland's air of strength and greatness, only a great deal more so. It is a vain attempt to record on paper my impressions of this morning, and it is truly misery to be unable to express in appropriate language such feelings as I experienced at seeing and hearing such men as Choate and Webster in the arena.

Hammond had been consulting with his father as

to whether he should prepare himself for a teacher, for which, as he thought, he should take two years of additional study in a German university, or should look forward for a career at the bar. Thus he writes to his father as to his plans regarding the future.

The first thought which naturally presents itself is that of the *three* professions, divinity, physic, and the law. Two are pretty easily decided. The first I should not do for, the second would not do for me, in other words, I can't be a minister, and I won't be a physician. There remains then law, to which add, as the only other paths where I can look for happiness and comfort, teaching and literature. The last is most to my taste of all; but I feel that in this country it is too precarious for a young man to rest himself upon, even when he can hope to succeed reasonably well. So after all, without some special godsend (for instance a secretaryship in some legation, or some situation of the sort where I could turn my proficiency in the languages, etc., to some account) I think my choice seemes narrowed down to pettifogging or pedagogism. There are not a few things that seem inviting on the former side—the study I think would be less difficult because less disagreeable to me than many find it, and besides in you and your library I should have every facility ready to my hands. But after all, I see no great promise in a lawyer's life. If I could hope to rise *preëminent* it might *perhaps* repay me for the sacrifice of many favorite tastes and pursuits which I should be forced to relinquish, yet even in that case I think my ambition is hardly strong enough to make that path worth pursuing. Again I do not think I am naturally so well qualified to *rise* as a lawyer as in other departments, and a poor pettifogger's is a miserable life. I might, perhaps, by hard study become a good *counsellor*, but I know I should never excel as a pleader. I do not doubt I should enjoy the study of the profession exceedingly, but I cannot say whether I should be happy or successful in its practice.

ent and rely solely upon his own efforts. In this no doubt he was wise, but he was unfortunate in giving so little thought to the achievement of financial independence.

With these advantages and disadvantages, young Hammond on attaining his majority entered upon the work of his active life.

The course of preparation for the bar in Judge Johnson's office was that which was common at the time before law schools had become the usual channel for preparation. Young Hammond read Blackstone, Kent, and Cruise's Digest of Real Property. He regrets that he has no one with whom to discuss what he reads, for "Sam is all over the city unless there is something to do at the office and is not fond of talking law at any time." He lays by in his letters to his father, various things which he wants to talk over with him and after relating that the business of the office is all in the line of drawing deeds, mortgages, leases, etc., in the manual department of which he had become tolerably expert, he wishes that his father would give him some directions where to look for explanations of these forms, asking whether there are not works which explain the principles of conveyancing, for instance, the form of deed in use, defining its terms and showing the meaning and relations of its various clauses. And he continues: "Few of the lawyers about here get beyond the *ita lex scripta est*. The more I see of the lawyers and the law students of the city, the more satis-

fied am I with my country education. A large proportion of the bar are educated, or rather uneducated, entirely in a lawyer's office, first as errand boy, then a copyist, with the privilege of learning what they can pick up of Latin, and grammar, etc., and so they finally get enough by rote to pass an examination without really knowing anything at all of the profession as a science. One told me that he was four years reading Blackstone through, and knew very little about it after all." "Briefly," as he writes his father in another letter, "my situation is this: I am at liberty to learn anything I please with every facility, but if I did not choose to learn there is nothing at all to make me." He seems, however, to have completed his course of reading and secured his admission in the usual time and to have entered into partnership with his preceptor and perhaps succeeded him in practice on his own responsibility after Judge Johnson was elected a congressman. Later, Hammond became the senior member of a law firm having an office in Wall Street. During this time he was somewhat active in politics, declining on one occasion to become a candidate for representative in the state Legislature and at another foregoing aspirations to a position on the bench for which his friends had been urging him, withdrawing in favor of his competitor, an older lawyer, on the sole stipulated condition that his competitor should unqualifiedly commit himself to the Republican platform.

But while Hammond's practice seems to have been

satisfactory, there is practically no record attainable as to its actual extent, nor as to the cases in which he took part; and indeed it is not remarkable that there is little record of it, for it continued only during seven years of time including his study in Judge Johnson's office. In 1856 he sailed for Europe for the purpose of restoring his health which was impaired. He traveled extensively and studied law at Heidelberg, and in the library there he indulged his fondness for old books.¹ Without doubt his interest in the historical study of the civil law dates from this time. He also perfected his knowledge of the German language and became able to avail himself fully of the learning of the German authors who have written so extensively on the civil law and the early Teutonic law. After two years he returned because such property as he had accumulated had been swept away by the financial crash of 1857 and he faced the necessity of making a new start in his profession. He probably attempted this in New York City, but in 1860 he came to Iowa on a visit to his brother who was a civil engineer, and who offered him a place on the corps of engineers which was locating a railroad. Finding that the out-of-door life was beneficial to his health, which seems not yet to have been fully restored, he decided to remain temporarily, became

¹ Hammond contributed to the "Newport News" sketches of his travels in England, and to the "Brooklyn Freeman" occasional letters while in Europe. He had furnished many editorials to the latter newspaper while he lived in Brooklyn and was throughout his life a frequent contributor to newspapers, magazines and law periodicals.

chief engineer of the work and liked the life of the west so well that to his own great surprise he cast his fortunes with the new state. He laughs at himself while engaged in this employment under circumstances so different from those with which he has been accustomed, "clad in a stovepipe hat, that in its better days Leary would not have disowned, a long-skirted coat, kid gloves bought in Italy, and a cane." He felt a loneliness which can better be imagined than described in being deprived of the social and intellectual excitements of life in the circle with which he had been familiar, as a boy in Newport, as a student in college, and as an evidently popular and welcome companion and friend among professional and art-loving people in Brooklyn and New York City. But he gave himself up wholly to the life in a new state, interested himself in politics and in the affairs of the community, and remained so far as can be discovered from anything he ever said or did, thoroughly satisfied with the exchange of his former life in the east for the new activities of the cruder but more ambitious and less self-satisfied west.² But his habits of mind and character were

² In an address to young men on an appropriate occasion Dr. Hammond commented on the work and privations of the early pioneers of Iowa and the corresponding years he had himself spent in travel and self-education, referring in that connection to the fact that he first had his attention called to the state which was to be his future home by the news which reached him while in Italy that an Iowa bank had failed and precipitated the financial crash of 1857. Then recalling his own privations in connection with his first years in Iowa, he proceeds: "But I can sincerely say that had my Iowa experience been even

not changed by the transition. He continued to read books which were extraordinary, to have tastes which could be but little gratified, to be unselfish and self-distrustful to a fault, and to cherish ideals which were little calculated to secure for him any public recognition or pecuniary success. Other business occupied his attention for but a short time and he soon devoted himself again to the law, attempting to practice in a little country town (Anamosa) where his learning could at best but occasionally be employed in cases of interest, and where his scholarship could cut but little figure. While here he was married to Miss Juliet Martha Roberts, the daughter of a Presbyterian clergyman, who, inspired by the missionary spirit had, some ten years before left a charge near Rochester, New York, to settle in Hopkinton, Iowa. Stimulated by this added responsibility he commenced to execute the plans which were to call out and fully exercise the powers and resources of a mind already skilled in methods and stored with knowledge but as yet not employed to any very successful issue in the practical work of life.

harder than it has been, I would not exchange it for the easiest life Italy could give. No! Were it granted me to return to the time when active life lies all before us; and if the Fates could place before me the two lives:—on the one hand Italy, with all its charms, and a life of ease, of freedom from care, of what is falsely but commonly called independence, on the other Iowa, rude, full of hardships, scant of pleasures, and a life of hard work, of constant care for the future, and even for daily bread:—still, if I know my own heart I would unhesitatingly choose as every true man must choose, not the country which has *only* a glorious past, but the country which has *only* a glorious future!"

Having compiled and secured the publication of a digest of Iowa Reports covering the cases later than those included in the first Iowa Digest which was prepared by Honorable John F. Dillon (then a judge of the Supreme Court of Iowa), Hammond removed to Des Moines hoping by means of the introduction to the profession which this work had given him to attract business as an attorney especially engaged in Supreme Court practice; and at the same time he assumed chief editorial supervision of "The Western Jurist" which the publishers announced to appear January 1st, 1867, and to which they invited the support of the profession as the only legal journal published west of the Alleghany mountains. He also became a regular instructor in the Iowa Law School, which had been established the preceding year by Judges Wright and Cole of the Supreme Court, and was made the secretary of its board. The specialty of practice in the Supreme Court was perhaps not capable of any very successful development at that time, for the court held terms in different parts of the state, and the local attorneys counted on presenting their own cases. The Western Jurist, though well received and attempting to serve local convenience by printing monthly digests of the cases decided in the Supreme Courts of Iowa and adjoining states, furnished no adequate field for literary occupation, and but modest remuneration for the editor; but the engagement in the law school opened a field for the employment of learning in the law and skill in its

arrangement and expression, and was therefore attractive to one of scholarly tastes. With his professional attainments, his erudition and his love for systematic and lucid expression of thought, he not only found this employment to his liking but at once demonstrated his capacity to do the work exceptionally well, so that when two years later an arrangement was made by the Board of Regents of the State University at Iowa City, by which the Iowa Law School was removed to the seat of the university and became its law department, he was made the head of the department with title of Chancellor, and removed to Iowa City, while Judges Wright and Cole remained professors giving such services as they could without conflict with their judicial duties, in the work of instruction. And so it was that Hammond came to be known as "Chancellor" to a great body of students who during the next thirteen years were under his instruction, and gave up for academic employment his ambition of practicing as special counsel before the Supreme Court, an ambition which he resigned with regret and in the belief that it was soon to be crowned, if he had continued to cherish it, with at least reasonable and satisfactory success; for, as the only resident professor he must necessarily give his entire time to the work of the law school and could not accept further professional employment. He continued for several years the chief editor of the *Western Jurist*, and contributed considerable routine matter and a few book reviews, such, for instance, as

one on Maine's Ancient Law, which showed his scholarly and critical tendencies. There were also articles by such men as Judge Dillon and Judge Cooley. But on the whole the *Western Jurist* did not furnish an inviting field for literary labor, and his connection with it was finally severed. After a few additional years of precarious existence the *Jurist* itself went off the list of periodical publications.

The opportunity for academic life and for pursuing studies which might be justified in connection with the work of a professor, but which must be thought of only as a dissipation and self-indulgence in one who was trying to earn a competency by the mere practice of law, even in a court of last resort, was fascinating to him and he felt, too, the noble ambition of doing whatever lay in his power "toward elevating the standard of legal education and the general tone, mental and moral of the western bar;" and he adds "If I can, during the rest of my life, know that I am accomplishing this end, so far as any one man can do it, I shall be fully content to give up all the rewards I might reasonably expect from a successful career at the bar." Moreover, he fully realized that he was "fitted by nature for such a life better than for the turmoil and struggles of the bar or politics" and he says: "The trials of my life have made me estimate at their full value, if not overestimate, the charm of such a peaceful, assured living." To the university, as an institution of learning, and not merely to its Law Department, did

Chancellor Hammond prove a most valuable and acceptable acquisition. He was a university man in the best sense of the term and he was closely identified with all its interests. He was for a considerable period the chairman of the Executive Committee of its Board of Trustees and in this capacity acted for a short time practically as its executive head, during the absence of the president. That he was regarded throughout the state as a man of prominence on account of his attainments in scholarship, was evidenced by the action of Iowa College at Grinnell in conferring on him in 1870 the honorary degree of Doctor of Laws.

And now to make any satisfactory presentation of what Chancellor Hammond accomplished, and to give any proper basis for an estimate of the value of his work as entitling him to recognition as one of Iowa's "Great Judges and Lawyers" it will be necessary to disentangle the activities of his subsequent life and separate into groups many matters in which he was simultaneously employed, for he often complains of himself that with every conviction of the importance of some one project or activity in his mind, he stops persistently to do something else, which has no immediate connection with the main end. Thus with the necessity of preparation for his regular work as teacher constantly oppressing him, he is as constantly diverted with fascinating interest in some book of the civil law or some investigation as to an Anglo-Saxon institution, or some disquisition on the phi-

losophy of law or natural right, fully realizing all the while that he can make no practical use of any of them for the immediate instruction of his students. And in the subjects which he is specially preparing for the class he is constantly consuming days of time to satisfy himself on a point which might easily have been passed over and the discussion of which will arouse no interest in the beginner. Even in Des Moines he had prepared a course of lectures on the History of Law which must have seemed a far-away subject to a small gathering of office students climbing through a one-year preparation for admission to the bar, and in Iowa City, while the law course was still completed within the limits of one school-year, he gave a course of lectures on one afternoon each week, in the civil law, telling himself all the time in his journal that the civil law as usually studied was of no assistance to the common-law lawyer.

But if anyone should imagine from this account that he was a mere "dryasdust" professor, dealing in antiquities or in abstractions incomprehensible to the ordinary student, he would entirely miss the mark, for if any one thing is well established by the concurrent judgment of all his students, not only those with a liberal education, but those whose preparation consisted in a common school education and much experience in life, it is that he was a vital teacher, that he inspired enthusiasm in the law and gave in some way which they would be entirely unable to explain, a notion of the practical working of its prin-

the part of the student in the analysis and discrimination essential in applying the abstract rules of law to the concrete facts of litigation, or the mere learning by rote of the pages of a law book in which were recited the deductions of the author from cases which the student has no means, or took no pains, to investigate. He was one of the pioneers in the work of training students to learn the law by becoming familiar with the actual processes employed by a lawyer or a judge under our common-law system in ascertaining by means of resort to adjudicated cases the principles of reasoning to be employed in solving the difficulty in the particular case, and in drawing from the vast and unclassified mass of precedents the principles which the court will apply in solving the case before it. He did not follow what is now generally known as the case system (which had not yet been introduced at Harvard when he began to teach) but he originated a method of his own which nearly approached it in its practical operation. He presented to his students lists of cases for reading on particular topics or subdivisions of his subject which he expected them actually to read in the library, and then by subsequent quizzing and discussion he brought out the reasoning on which the cases were based. He did little formal lecturing, and preferred not to use text-books, but for convenience he prepared in his principal subjects, real property, torts, equity and bailments, printed synopses showing an analytical classification of the sub-

ject-matter and giving references to leading cases to be read. He recognized as fully as anyone now recognizes the difference between mere case law and the study of leading cases, and he made familiar to his students by precept and example the methods by which the lawyer and the judge actually find out what the law is and become skilful in applying the law of a case to its facts.

Chancellor Hammond was a leader in the west and indeed one of the leaders in the whole country, in the great work which has placed America far in advance of England, and for that matter in advance of any country, in the scientific teaching of the law in schools. He had high ideals for law schools and felt much disappointed with the work they were doing after he had become familiar by practical experience with what might be done in the better teaching of law and in the advancement of legal education. He was for a time one of the most active members of the American Bar Association in its efforts toward the promotion of a high standard for legal education and admission to the bar; and was for several years the chairman of its committee on legal education. His reports on that subject, especially his second and third reports read in 1891 at Boston and in 1892 at Saratoga, were recognized as profound discussions of the problems to be solved in the effort to give to the American law student the best training for the work of the profession. Indeed the nobility of the law as a profession, its contributions

years and which covered the period of development of the state institutions practically from their very beginnings. The fact that they were able to condense this mass of legislation into a Code of 4806 sections, embraced in 738 pages, indicates the thoroughness with which their work was done, and demonstrates the possibility which has not always been realized in public undertakings of this character, of men charged with official duties rendering services as efficient and satisfactory as those expected of men who charge themselves with private undertakings. The commissioners followed the natural arrangement of subject-matter found in the Code of 1851, by which the whole public statute law of the state was divided into four parts, public law, which included the organization of the state, county, city and school governments and the provisions as to state institutions; private law, which was brief and included only the changes in the common law which the Legislature had seen fit to make; The Code of Civil Practice, which was not materially different from the corresponding part of the revision of 1860; and The Code of Criminal Procedure, in which all crimes and punishments were prescribed and methods for trying criminal cases provided. Of these four parts Doctor Hammond had special charge of the first two, and perhaps the only original work that can be distinctly attributed to him is the incorporation of liberal provisions with reference to the personal and property rights of married women. But that he was

an active and influential member of the commission throughout its proceedings appears from the fact that he was selected by his associates to prepare the entire report for publication, and put it in its final form for presentation to the Legislature. This report without material modification was adopted by the Legislature and became the Code of 1873.

When the next Code Commission was appointed in 1894, although its authority was as great as that of the commission of 1870, it found little occasion to change the sections of the Code of 1873, save to incorporate legislative amendments and insert in the proper connection the legislation on some particular subjects which had been more fully developed during the interval; and the Code of 1873 may well be treated as still remaining, and likely to remain for a long time, the substantial embodiment of the law of the state so far as it has been sought to reduce it to written form. It is doubtful whether in any state in the Union there is a more complete and satisfactory codification. There has been no attempt to reduce the private law in general to written form and the period has now probably passed for any further agitation of that once popular scheme. Doctor Hammond was never an advocate of any such plan, for while thoroughly familiar with the Justinian codification and its adoption in the modern states of Europe as the basis of their various codes, he recognized fully the essential difference between the common law and the civil law and appreciated the ad-

vantages resulting from the historical growth and development of the former; and he would not sacrifice these advantages for the mere apparent convenience of a formal code.

There is very little trace of original interest in the civil law in any record which is left of Doctor Hammond's readings or writings, even as the result of his year of study at Heidelberg, until after he became a professor in the State University of Iowa; but here his interest was early aroused and was persistent. He speaks of the civil law as fascinating to him on account of "the flavor of the literary and erudite taste which accompanies it, so different from the wilful Philistinism of the common lawyers," and he continues:

Yet I do not forget the substantial merits of the common law and common lawyers as some seem to do at once when they have tasted ever so little of the Circean cup brewed by Tribonian & Co., e. g. Phillimore, whose diatribes against everything English are positively brutal, and his admiration of the *Corpus Juris Civilis* unreasoning. I want to embody in my civil law lectures a fairer and more careful estimate of the real merits and defects of that system than I have yet found. Of course I do not presume to judge it as it stands in history, with all its services to Rome and the world; but only as we face it to-day, in the capacity of students, asking what it can teach us that is of value to an American lawyer, strictly as such. With all my enjoyment of it and love for it, I suspect my estimate of this value will not be so high as it is now fashionable in some quarters to place it.

Sending to dealers in Germany for such old books as could be had, admitting him as nearly as might be

to the original sources of knowledge, and not contenting himself at all with modern compilations, he delved into the earliest printed editions of the *Corpus Juris Civilis*, and like medieval matter, with a view, so far as he seems to have had any purpose aside from that of gratifying the mere love of the acquisition of knowledge, to write an introduction to the civil law for beginners. Later the civil law assumed an added importance in connection with the study of the history of the common law.

The result of these studies in the civil law was the Introduction to his American edition of Sandars' Institutes of Justinian, published in 1876, and subsequently published as a separate work under the title "System of Legal Classification of Hale and Blackstone in its Relation to the Civil Law." As the title to the matter when issued separately would indicate, this introduction was taken up largely with the question of classification under the two systems, and an inquiry into the extent to which the work of the civilians had influenced the writers on the common law. And instead of following up the plan pursued by modern English writers in their brief accounts of the civil law of assuming that the early civilians developed a scientific system of classification, and that the common law is without systematic classification save as it has crudely and without intelligence adopted the phraseology of the civilians, he points out clearly that the Roman jurists were dependent from first to last upon the traditional order of the

more firmly than this; that the surest and, on the whole, the easiest method of learning the true nature and contents of any legal, political, or ethical doctrine, is to trace carefully the successive steps by which that doctrine has been formed in time."

As has already been indicated Doctor Hammond introduced a short course of lectures on the history of law at the very beginning of his law school work and he proposed to himself the task of writing some kind of a treatise on the history of the common law showing "what it is, what are the sources from which it is drawn, what are the materials of which it is composed, what is its method of framing rules and deciding cases, and what are its relations to statutes, constitutional law, equity and ethics." In his plan of subjects to which he proposed to devote his attention, sketched at the beginning of his summer's vacation of 1871 (for a vacation with him was simply a change of work and not a cessation) he puts this last, for as he says, "I can get along without it for several years if necessary better than without the others, so little is the historical study of law generally appreciated; and also because all I can hope to do in any one year is only a small part of the entire plan;" but he adds: "This more than any other seems to me now the part of my work to which I should be willing to devote year after year of patient toil and at which I might in such case work with a secret hope of leaving something by which I could be remembered after I am gone." With this view he accumu-

lated such books as he could that would serve him as original sources. He mastered March's Anglo-Saxon Grammar. He read especially the works of the German students of Anglo-Saxon law and institutions, finding in them an appreciation of the significance of the early English institutions which was wholly wanting in the English writers on the same subjects. He commenced to read the Year Books in course and make voluminous notes and in some instances even complete translations of the cases.⁸

In other words he attempted a task for which a lifetime of systematic study and single-minded devotion would hardly have been sufficient, the task of becoming familiar by the study of the originals with the sources of the common law and the growth of the principles embodied in it. This work which had largely occupied such portions of his time and strength as he could spare from his regular labors as the principal and practically the only resident professor in the Law Department of the State University of Iowa, up to the time that he severed his connection with that school in 1881, to go to St. Louis, and charged also with the administration of the school, the interests of which always occupied the foremost place in his attention and which, by the way, he discharged with marked efficiency, was continued after he became dean of the St. Louis Law

⁸ A collection of manuscript notes on the Year Books has been presented by his daughter, Miss Juliet Hammond, to the Law Library of Harvard University.

School and up to the time of his death. As incidental to his work and as tentatively embodying the results of some portions of these labors he prepared a series of lectures on the history of the common law which he delivered in his school and also in the Boston Law School, the Law Department of Michigan University, and his old school, the Law Department of the State University of Iowa. In these lectures he recorded to some extent his investigations into the law of the Anglo-Saxon period, the sources of the common law, and its theories. But he evidently did not regard his treatment of even these few topics as final and, while he had much matter in consecutive form on different branches of the subject, he did not leave even considerable fragments of his work in satisfactory shape for final publication.

Perhaps his mind was in its operations essentially analytical rather than creative, critical rather than constructive. There are detached fragments written with the deepest insight and in a style of remarkable clearness and force, a style perfectly classical in its adaptation of well-chosen language to the expression of profound thought; but the connecting links are missing. These he alone could supply, these were indeed clearly in his mind, these in a lecture he could fill in with rare success; but without them the whole result of his labors lacks constructive connection.

It were vain now to wish that he had had the leisure and the physical strength to carry his great plan to completion. Indeed such a wish were idle,

for in addition to his regular work of teaching, which seems rather to have steadied than wearied his mind, he performed labors of investigation which have not been surpassed by those who have worked in such fields with comparatively little distraction, and his physical strength, while never great, sustained him through as many hours of close application each day of his later life as the most robust men have usually found themselves capable of. It were alike idle to wish that he had not had the disposition for accumulating knowledge in so many different fields, for it was this mass of accumulated accurate knowledge of literature, history, and philosophy which peculiarly fitted him for his ultimate undertaking. The only regret which one can justifiably feel with reference to him is that human life is too short for the completion of any such plan as he conceived.

But whatever regret we may feel at the failure to complete the history of the common law, there is ground for satisfaction in the thought that the labors performed with that end in view were made use of to a considerable extent, and their fruits preserved to us in an edition of Blackstone, the notes to which embody the results of his original researches into the history of the common law. The plan of such an edition, which was conceived after going to St. Louis, was carried out with great industry and the work, published by the Bancroft-Whitney Co., of San Francisco, appeared in 1890. The editor's purpose was to prepare notes to Blackstone which should

punctiliousness of a gentleman of the old school, and always characterized by innate refinement. Never with anyone did he exhibit or countenance a coarseness of thought or expression, although he was capable of the use of vigorous and effective language when there was occasion to employ it.

In his younger days he was jovial and companionable, a witty after-dinner talker, and fond of society, but in the west his studious habits gained him the reputation of a recluse, although to a few intimate friends he was always accessible, and enjoyable. His love of wit and humor continued, however, throughout his life and he was always a delightful story-teller as he was also always a fascinating talker. He had the faculty of giving interest and vitality to any subject which was under discussion and of contributing to the discussion, observations showing his varied learning and his sound judgment.

And finally he charged himself with a duty to his fellow-men and the community in which he lived to have a helpful interest in human affairs. As a motto "*nihil humani alienum mihi*" was not only consciously adopted but unconsciously adhered to. He wrote much in a casual way in behalf of interests which appealed to him as connected with the public good and he responded often to invitations to deliver addresses in which he sought not simply to please but also to edify his hearers. He was a good and agreeable public speaker, but made no effort for oratorical effect, usually preparing a manuscript for any ad-

dress and reading it in a scholarly and effective way, feeling at a disadvantage when in some emergency he was required to speak without immediate preparation. As has already been indicated he was capable of fluent and effective expression without notes on any subject in which he was deeply interested and about which he had thorough knowledge, and his students remember with delight the clear and concise exposition which he could give on the spur of the moment in the class-room of some unexpected question which might arise in the course of a discussion, hesitating now and then for a moment until he could select the exact word to express the meaning or distinction which he sought to convey. But he made no pretensions to the arts of an *ex tempore* speaker, and put the thought ahead of the expression. In short he was genuine through and through, a man of lofty ideals and purposes, unselfish and self-sacrificing to a fault, and a faithful high-minded citizen of his commonwealth.

CHARLES DOE

From a painting by Robert Gordon Harding, the property of Dartmouth College.





CHARLES DOE.

1830-1897.

BY

CRAWFORD DAWES HENING,

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IT is now ten years since the late Chief-Justice Charles Doe of New Hampshire died at the age of sixty-six, after a judicial career of almost unprecedented length—thirty-four years. The aim of this essay is to present to the American Bar some adequate idea of the results of his labors in the fields of the common law.

New Hampshire and her Supreme Court are remote from the largest arteries of American trade with its consequent litigation, and the error might easily be entertained that the legal questions decided by that tribunal are not of first importance. The student of the common law, however, knows well—to use one of Judge Doe's favorite expressions, that "there are no small cases in court." Mr. Justice Holmes, too, has recently remarked with aptness that, "great cases like hard cases make bad law." It is not surprising, therefore, to find that many of the cases decided by Judge Doe, though "small" in the amount involved are yet the exponent of such im-

portant common law principles and contain such exhaustive exposition of the reasoning underlying prior English and American cases that his decisions have exerted a potent, far-reaching and lasting influence throughout the judicatures of the American States.

He was born at Derry, New Hampshire, in 1830, and was the sixth descendant of one Nicholas Doe who came from Devonshire, England. Judge Doe's liberal education at Dartmouth, where he graduated in the class of 1849; his study of the law in the office of the most prominent New Hampshire practitioner of that day, together with the mental stimulus which he obtained from a few months' course at the Harvard Law School, deserve passing mention. But a number of other far more important facts created an environment for Judge Doe favorable to judicial achievements of the highest order. He was married to a woman who was in every sense his intellectual peer.¹ He came of a family of prominence in his county and was a man of independent means all his life, living the life of a country gentleman. He was a country judge, a member of the appellate court of one of the smaller common law states. Nor was he occupied wholly with appellate work, having had many years experi-

¹ In 1865 he married Edith Haven, daughter of George Wallis Haven of Portsmouth, New Hampshire, and settled immediately upon the old family homestead of the Does', at Rollinsford, N. H. There he lived his entire life, and near the same homestead he is now buried. Judge and Mrs. Doe had nine children. His widow and eight children survived him.

ence as a judge at *Nisi Prius*. He had practiced law as a country lawyer only about six years when at the age of only twenty-eight he was appointed on September 23d, 1859, to the Supreme Bench. In 1874 the court of which he was an associate-justice was legislated out of existence by the Democrats. He was not appointed to the new court then created, but in 1876, on the return of the Republicans to power, another Supreme Court was organized and of this court, Judge Doe was made chief-justice, a position that he held until his death in 1897. He thus sat on the bench almost thirty-five years, "longer than Marshall, Taney, or Shaw . . . longer also than Lord Mansfield, or any English judge with the exception of John Heath," longer so far as the writer is aware than any American judge except William Cranch of the District of Columbia, Chief-Justice Gibson of Pennsylvania, Judge Hare of Philadelphia, and Mr. Justice Field. The significance of many of the foregoing facts is obvious, though some require further explanation.

Overworked city judges and justices of other supreme courts will readily understand how one of the chief factors of Judge Doe's successful judicial career was the fact that he was a country judge of one of the smaller states, with ample opportunity for legal investigation. It became his intellectual hobby. He had the time to trace numerous streams of law to the fountain-head, and to write elaborate and exhaustive opinions. Though he did not delay in giv-

ing judgments, for a period of twenty years he delayed the publication of the official reports of his state from five to seven years to give himself time to pursue his legal studies and researches. It was the first article in his judicial creed that no question, whether *res integra* or not should be considered as settled until settled correctly. The time he devoted to expose an error or vindicate an important principle, to illustrate his *ratio decidendi* by an infinite collation of decisions from the common law reports, to leave no authority unexplored, no opposing argument unsilenced, no conflicting precedent undifferentiated or uncondemned, was to him wholly inconsequential. To this end he devoted the arduous labor of months, and even of years to the preparation of a single opinion. He could never, however, have obtained this indulgence had he sat on the appellate tribunal of one of the larger states. The result, however, is that the temporary annoyance of the New Hampshire Bar is now fully compensated by the possession of a body of common law opinions of permanent utility, and that to all students of the common law he has bequeathed these exhaustive legal essays which, like field-notes, show where he has surveyed and plotted out, with inexhaustible patience and attention to detail, vast regions of the common law, where formerly all was doubt and perplexity.

The short period of his practice before his elevation to the bench is also a significant fact. Had his experience as a practitioner been longer, a

greater respect for the formalities of procedure and their attendant certainty would no doubt have modified the intense radicalism of his procedural reforms. But we should err if we supposed that at the time of his appointment he was an inexperienced lawyer. In five years and a half he had become an active practitioner in his county. He owed his rapid rise primarily to family and political connections in Strafford County. These affiliations gave him at once public office and private business, and his intense mental activity and industry won their inevitable reward. Not only is there the authority of Judge Jeremiah Smith that, "he came at once to the front, becoming *per saltum* one of the prominent members of the Strafford Bar,"² but the docket of the Court shows that he appeared as counsel in numerous civil cases.³ He had left the Harvard Law School to become county solicitor, and after creditably representing the state in that office, he represented the defense with equal credit in a number of criminal causes. His arguments as counsel showed the keen dialectic, afterwards so familiar in his opinions. One of his early cases was against his aged preceptor, Daniel M. Christie. The case turned on the admissibility of certain evi-

² Memoir of Charles Doe by Hon. Jeremiah Smith, Proceedings of Southern New Hampshire Bar Association, 1897, p. 128.

³ "We have been over the dockets again very carefully, and we feel sure that Charles Doe's name appeared as counsel in 223 different cases up to the time of his appointment to the bench." Letter to writer from W. H. Roberts, clerk of Superior Court, 1906.

dence. Doe, for the defense, filled the table with law books and after a lengthy argument prevailed.⁴ Later in life when commenting on the indifferent preparation certain lawyers made for a trial, he recalled with what nervous trepidation he awaited his first argument to a jury, and what violent nausea the excitement and fear of failure caused. "That," he observed, "is the only way in which an attorney of any intellectual promise will approach his first argument."

The judges of the Supreme Court of New Hampshire, to which Judge Doe was appointed in 1859, were required not merely to sit as an appellate tribunal, but to "ride the circuit" as *Nisi Prius* judges. From 1859 to 1874, the larger proportion of his work seems to have been done at these "trial terms." Judge Doe's most important life work was the reformation of New Hampshire remedial law; that is, practice, pleading and evidence. It is safe to say that this work would never have been accomplished by one whose chief experience had been as an appellate judge. In truth, until he became chief-jus-

⁴The writer is indebted to Hon. Daniel Hall for the following anecdote: "In his closing argument Mr. Christie paid a very handsome tribute to the ability which he had encountered in the trial somewhat in this fashion. 'When I remember that students in my office have become so distinguished in the profession, one of them now being a very distinguished United States Senator (John P. Hale), and another chief-justice of the highest court in New Hampshire (Ira Perley), and when I find myself, as in this case, vanquished by another of them, I am admonished that it is time for me to retire from these scenes.' Mr. Christie was at the time seventy-three years old."

tice in 1876, he wrote scarcely any opinions of consequence, except dissenting opinions. Most of these dissenting opinions related to some branch of procedure, and his dissenting views on practically every question of procedure and evidence ultimately became the law of the state. As late as 1866, one of his ablest colleagues expressed the hope that Doe might *yet* make himself a name as a judge.

At *Nisi Prius* he immediately manifested a type of mind so wholly unconventional, a determination so bold, so unswerving to reform the conduct of trials, such an adroit readiness and resourcefulness in effecting the triumph of justice, that even Bentham would have hailed him—"A Daniel come to judgment!"⁵

His influence upon pleading and practice is apparently a subject of mere local interest and importance, but this is not the fact. The reforms effected by Judge Doe in common law procedure were the result of two ideas that inspired his entire judicial life; first, the theory that substantive common law rights exist independent of any particular writ for their enforcement; and second, what might be called an intellectual passion that the citizen should obtain those rights as cheaply as possible. His theory starts a discussion as to the nature of the common law itself and hence is interesting to all who study or

⁵ The interested reader will find that a number of anecdotes in support of the assertion in the text have been collected by Judge Smith in his *Memoir*. *Proceedings of Southern New Hampshire Bar Association*, 1897, pp. 143-144.

practice the common law. His intellectual passion is worthy of judicial emulation at all times and in all places. Mr. Justice Carpenter, his associate, was fond of saying that "no judge ever lived, save one, who exercised a more potent influence in the direction of judicial reform in his own jurisdiction than Judge Doe, and that was Lord Mansfield," and that "in no place on God's footstool could justice be had so cheaply as in New Hampshire through the influence of Judge Doe." In fact one might easily believe that he had taken the oath which Bentham would have administered to his code-enforcing judges:

That I will not through favor to those who profit by the expense of the administration of justice connive at, much less promote any unnecessary expense; but on the contrary study, as much as in me lies, to confine such expense within the narrowest bounds compatible with the purposes of justice.

Judge Doe entered upon his judicial labors contemporaneously with the wave of sentiment in favor of procedural reform that had produced in England the various Law and Chancery Procedure Acts, and had inspired codification and practice acts in various American states. Chief-Justice Bell, in the year of Judge Doe's appointment to the bench, had drafted a body of "Rules for Regulating the Practice in Chancery." Judge Doe always referred to these rules as "Judge Bell's monument." The success of Judge Bell's rules acted no doubt as an inspiration for Judge Doe to reform the procedure at

common law, but his enthusiasm did not manifest itself in the drafting of any body of common law rules for adoption by the Court or for enactment by the Legislature. "The New Hampshire Court in Judge Doe's day did not feel constrained to sit with folded hands waiting for the Legislature to enact a poorly-drawn code. Instead of this the judges proceeded to simplify practice by their own decisions." How and to what extent this simplification was effected will now be briefly told and, as above stated, is of general interest, for not only "the result is a flexibility of remedies in New Hampshire not surpassed by any of the so-called code states; and further, the absolute certainty that cases will be decided on their merits,"⁶ but the way this has been effected is unique in common law jurisprudence.

New Hampshire was one of the heirs at law of all the common law remedial actions. Equity was and is still administered on one side and law on the other side of the same bench. From at least the year 1842 there had been a statute of Jeofails and Amendments allowing a rectification of errors whether of form or of substance.⁷ But as late at

⁶ Smith's Memoir, Proceedings Southern New Hampshire Bar Association, 1897, pp. 144-145.

⁷ The revision of 1842 provided as follows: "Section 10. No writ, declaration, return, process, judgment or other proceeding in the courts or course of justice shall be abated, quashed or reversed for any error or mistake, where the person or case may be rightly understood by the court, nor through defect or want of form or addition only, and courts and justices may, on motion, order amendment in any such case.

We are not entrusted with the power of infringing substantive rights by withholding the necessary incident and appurtenant right of complete remedy: the common-law duty of inventing necessary forms of action, pleading, trial, judgment, and initial, intermediate, and final process, is as imperative now as it was during the ages in which its performance produced all the common-law procedure that is obsolete, and all that is now in use; the precedent to be followed is the performance of this duty, and not a violation of it. . . . Without overruling this doctrine, a judgment that would leave the exemption in force cannot be rendered against the adjudicated right of the plaintiffs; and the settled doctrine cannot be overruled without holding that all the common-law remedies and procedures of a thousand years are judicial usurpations of law-making power.

The alleged want of reversing power in this court is an alleged infirmity of a writ of *mandamus*. We need not inquire whether there are jurisdictions in which an exempting violation of statute is upheld by the defect of ancient process now brought to the defense of this wrong. When New Hampshire law of person, property, and equal taxation is arranged under such heads as *assumpsit*, *mandamus*, and other insufficient forms of action, the inverted classification does not subject supreme rights to the domination of servient and incompetent remedies of judicial origin. The statute provides for the correction of the error of the lower court. The present position of the defendants in interest is that the error of the nominal defendants cannot be corrected because *mandamus* does not convey corrective power. This is in effect a claim that the court should disobey the law because among the writs constructed by them and their predecessors there is none adapted to this case. It is, at most, an overruled objection to the introduction of a new form of action. *Walker vs. Walker*, 63 New Hampshire, 321. If such objections had prevailed in former times, there would have been no common-law procedure. . . . A writ containing an order to enforce the Pillsburys' liability by assessment is an appropriate remedy in

this case, and it is not material whether the words "of *mandamus*" are used or omitted in the petition, judgment and final process. Neither is it necessary to inquire whether any command that can be issued is a common-law or a statutory *mandamus*, or one of the "other writs" authorized but not named by the statute. The efficiency of process does not depend upon the record's giving it a technical name in a dead or a living language. There is no law for turning plaintiffs out of court on a question of terminology.

Nowhere has he more forcibly and clearly stated his views than in the following passage:¹⁰

As our common-law furnishes all writs necessary for the furtherance of justice and the due administration of the laws, there can be no legal right without a remedy, and there is no occasion in this case to consider peculiar powers of the king's bench (continuously vested in this court since 1699), or to distinguish between ordinary and extraordinary process, or between prerogative and other powers. . . .

The statement that a *mandamus* can be granted, or a bill in equity can be maintained, when there is no other adequate remedy, may be understood in a sense at variance with New Hampshire law. There would be adequate remedies if a *mandamus* were unknown in England, and chancery had not been invented as a separate jurisdiction. "*Mandamus*," "trespass," and other names of ancient forms of action, are used here as references to the character of rights asserted, wrongs complained of, or remedies sought, in particular cases, but with no recognition of the forms as tests or limitations of rights or remedies. When, as in this petition, with due precision and brevity, a plaintiff asserts a legal right and an infringement of it, and asks appropriate relief, his case is decided on the facts proved, without a waste of time in the consideration of a form of action. . . . It may be said that there is no form of action, or that the only one is a party's application for a judgment, and his averment of a ground on which he is entitled to it.

¹⁰ Attorney-General vs. Taggart, 66 New Hampshire Reports, p. 369.

be in equity. Judge Doe asked the defendant's counsel if his only objection was that the proceeding should have been a bill in equity, and, receiving an affirmative reply, said: "Very well then, Mr. Clerk, you may just write 'bill in equity' on the back of that writ, and now, gentlemen, we will proceed with the hearing." As a matter of fact, continuances were customarily granted whenever such a radical amendment was made.

As has been above stated, the New Hampshire Supreme Court had for many years administered law on one side and equity on the other. Judge Doe's invention of the mutual convertibility of legal and equitable pleadings practically accomplished in New Hampshire what the English Supreme Court of Judicature Act of 1873 accomplished in England—the obliteration in practice of the distinction between legal and equitable rights. But by Judge Doe's invention the historical remedies are preserved by name. In England the historical name of the remedy is lost. The establishment of the English system under the Judicature Acts "required the enactment of a mass of orders and rules to an extent unknown to any judicial tribunal with us, an entire code of forms even more numerous than any that has accumulated in the United States under any common law system of pleading, practice and procedure, or under any other."¹⁴ In New Hampshire Judge Doe's

¹⁴ Address of Hon. William L. Putnam, Proceedings of Southern New Hampshire Bar Association, 1896, p. 27.

régime of reformed pleading and practice was introduced by no statute whatever other than the Statute of Amendments above referred to. He held another statute to be wholly unnecessary. As a result of Judge Doe's efforts in the reformation of procedure the rule is also now definitely settled in New Hampshire that any declaration at law, whether in covenant, in *assumpsit*, or in a writ of entry, may be amended into a bill of equity; in like manner a bill in equity may be amended by filing a declaration at law in trespass, or in a writ of entry, or any other appropriate writ. If convenient to a proper comprehension and adjudication of rights the legal and the equitable process may simultaneously advance along parallel lines in the same court.¹⁵ The verdict of twenty years' experience is heartily in favor of the new system. No agitation has ever been made either to return to the former method or to resort to experiments in codification.

The decision of another important procedural question by the New Hampshire court in 1870 illustrates the elaborate research into common law principles and precedents always characteristic of Judge Doe's work. If a verdict is in part erroneous, can the new trial be limited to the issues erroneously decided, or must there be a *venire de novo* of the

¹⁵ Cases illustrative of assertions in the text are, *Winnipiseogee Paper Co. vs. Eaton*, 64 New Hampshire Reports, 234; *Haverhill Iron Works vs. Hale*, *Ibid.*, 406; *Sleeper vs. Kelley*, 65 *Ibid.*, 206; *Tasker vs. Lord*, 64 *Ibid.*, 279; *Cushing vs. Miller*, 62 *Ibid.*, 517; *Walker vs. Walker*, 63 *Ibid.*, 321.

whole case? Though the practice on this point was wholly undetermined in New Hampshire in 1870, there were a few decisions in Massachusetts, South Carolina, Alabama, and Iowa in favor of a partial retrial. But these decisions left wholly undiscussed the great number of opposing English and American authorities. A conflict and confusion of jurisdictional precedents invariably stimulated Judge Doe to undertake an original investigation into the *rationale* of the question. He was therefore not content until he had traced the evolution of the power of courts to modify, without destroying verdicts and judgments. He analyzed all the important English cases in his zeal to dispel "the error of holding superstitiously to an imaginary technical indivisibility of a general verdict." He remarks:¹⁶

Several questions of fact have been tried and decided by the jury. In the trial of the question whether Isaac paid all taxes duly assessed, there was error; all the other questions were correctly tried. Is the correct trial of all other questions invalidated by the mistrial of a single question? Is the right decision of all the other questions nullified by the erroneous decision of one? . . . The entire practice of granting new trials is an innovation which has grown up gradually. . . . The ancient forms of process and procedure have been remodelled piecemeal by the Courts. . . . There is no general rule that when there has been an error in a trial, the party prejudiced by it has a legal right to a new trial. He has a legal right to a cure of the error but not to a choice of the remedies. . . . When the erroneous part of a case is cured; the general principles of our jurisprudence do not require the application of the remedy to other parts of the case

¹⁶ Lisbon vs. Lyman, 49 New Hampshire Reports, 582.

which do not need it. A court has as much power to construct a *venire* now, as the court who made the first precedent on the subject; and it is the duty of the court not to allow injustice to be done by antiquated forms of process and record. A *venire* is not law, but a mere subordinate piece of one of the numerous methods devised by the court for administering the law. The general principle of the law, which in correcting errors saves the good and destroys only the bad is not defeated by want of judicial power to make any significant form of a *venire* that may be needed.

The enthusiasm with which Judge Doe continually looked ahead for opportunities of improving and making straight the paths of legal procedure is well shown by a letter to Judge Ladd when both were associate-justices.

ROLLINSFORD, Feb. 22, 1872.

Bro. Ladd:

Can you tell me whether there is a case in the Law term, raising the question whether setting aside a verdict as against evidence, is a question of fact or discretion for the Judge and Trial Term; or any other question of discretion?

I have some materials that I think I could work into an opinion on the distinction between matter of discretion and matter of law, and I should like to swap and get a question of that sort.

Yrs, C. DOE.

He does not seem to have found the case he wished to decide until 1877; when he promptly overthrew the previous practice.¹⁷ Through his influence the distinction between appealable error in deciding a question of law and non-appealable error in deciding a question of fact became a fundamental principle of New Hampshire practice.

¹⁷ Fuller vs. Bailey, 58 New Hampshire Reports, 71.

The beneficial effect of many of his procedural innovations is not lessened by the fact that in others he was carried too far by the momentum of his zeal for reform. Instances in which he was swept beyond the bounds of reasonable certainty and safety may be seen when he actually invented a new form of action, unheard of at the common law, in a case where, conceding the existence of the judicial power of inventing actions, there was clearly no occasion for its exercise.¹⁸ But he believed that in the common law there are no lost arts. His imagination was captivated by the idea that if Glanvil could invent *replevin* and the assize of *novel disseizin*, if Rolle could invent ejectment, and the Elizabethan judges *indebitatus assumpsit*, the power to invent new writs by virtue of the famous statute of Edward I still existed to-day in any common law judge. "The law," he insists, "has not fixed a day when the precedents of its adaptation to the mutability of human affairs shall no longer be in force." Again, his theory that Equity was only a usurpation of the common law (a theory which he no doubt imbibed from Austin) led him in the above instance to deny the equitable relief on the ground, that although a statute conferred expressly a jurisdiction upon equity, he could invent an appropriate though hitherto unheard-of writ for the recovery of real estate, and thus provide a plain, adequate and complete remedy at law. His notion that equity was only a usurpation of the common law

¹⁸ Walker vs. Walker, 63 New Hampshire Reports, 321.

would seem to be as complete and unserviceable a fiction as any which his rational criticism demolished. Finally, we may observe, that in putting into effect the reformed procedure, Judge Doe and his associates and successors, have permitted a greater laxity in dispensing with written pleadings than was required to render elastic the rigidity of the common law pleading. He himself abominated common law pleading believing, to use Blackstone's expression, that inevitably "justice was strangled in the net of form." Accordingly, he deliberately discouraged the use of all formal, written pleadings. Not infrequently counsel are permitted to state their positions orally and thus to depart from the declaration or bill without being required to file a written amendment. Though this may be a return to what Judge Doe delighted to term the ancient simplicity and convenience of the common law, the experience of the New Hampshire courts has shown that the archaism of permitting pleadings *ore tenus* is complex, inconvenient, and highly confusing.

Passing mention may also be made of his unsuccessful effort to assimilate the writ of *quo warranto* to a bill in equity. In a rather fanatical moment his general opposition to technicalities of pleading and procedure led him to contend that such a bill should be maintainable by anyone claiming an office.¹⁹ He afterwards seems to have abandoned this theory.²⁰

¹⁹ Osgood vs. Jones, 60 New Hampshire Reports, 543.

²⁰ Maverick Co. vs. Hanson, 67 New Hampshire Reports, 203.

His unsuccessful effort to reform criminal procedure by abolishing the time-honored practice of pronouncing the sentence of death in open court should also be noted. The futile practice of asking the convicted murderer why he should not be sentenced, when no reason which he might or could assign could possibly change the purpose of the judge, seemed to Judge Doe an intolerable relic of medieval barbarism. He styled it "an idle, unnecessary and brutal performance that could serve no useful purpose whatever." He attempted to substitute for this ancient practice the more humane one of causing a certified copy of the sentence of death to be served on the condemned respondent in the state penitentiary. The abruptness with which Judge Doe introduced his innovation in the case of *State vs. Almy* was dramatic. The writer is informed by the County Solicitor who conducted the prosecution that neither he nor the Attorney-General had any intimation that the criminal procedure of New Hampshire was altered until they entered court after a recess and made a motion that the prisoner be brought into court to be sentenced. They then learned that the prisoner was on his way to the state prison at Concord. During the recess Judge Doe had obtained from the prisoner's counsel a waiver of the customary death sentence.²¹ Upon

²¹ The writer can find no evidence that Almy expressed a fear of being lynched, though that explanation of the performance has been advanced by Samuel C. Eastman, in *Green Bag*, vol. IX, 250-251. Both the County Solicitor, Mr. W. H. Mitchell of Littleton, N. H., and the counsel for Almy, Mr. Burleigh of Plymouth, N. H., state

subsequent reflection and examination of the authorities Judge Doe, however, became convinced that his reformed procedure was not "due process of law" as required by the Fourteenth Amendment, and the prisoner's sentence was at last imposed in accordance with precedent.²²

In the field of evidence Judge Doe's achievement worthy of mention *summa cum laude* is the confining of the maxim *res inter alios actæ, etc.*, within proper bounds and the restoration of the logical and scientific principle of experimentation to its legitimate sphere of activity.

In 1872, in a highway-injury case, *Darling vs. Westmoreland*,²³ the question arose in New Hampshire whether the fact could be shown that another horse on a different occasion had been frightened by the same pile of lumber that had frightened the plaintiff's horse. Though the supreme courts of Connecticut, of Maine, and of Vermont had all previously decided this precise question in favor of admissibility, a contrary rule existed in Massachusetts, and in New Hampshire.²⁴ The decisions admitting

that no fear of being lynched was expressed by Almy, and that there was no apprehension of such an occurrence. Judge Doe seems to have been the only person interested in altering the time-honored procedure.

²² *Ball vs. United States*, 140 United States Reports, 118.

²³ Samuel C. Eastman, in *Green Bag*, vol. IX, 245; 52 New Hampshire Reports, 401.

²⁴ Compare *House vs. Metcalf*, 27 Connecticut Reports, 631; *Hill vs. Portland & Rochester R. R. Co.*, 55 Maine Reports, 438; *Kent vs. Town of Lincoln*, 32 Vermont Reports, 591, with *Collins vs. Dor-*

the evidence were, however, supported neither by satisfactory reasoning nor by any criticism of opposing authorities. They wholly failed to distinguish between discretionary exclusion on the ground of remoteness and exclusion on the ground of non-probateness of the issue, and they wholly omitted to show why the admission of the evidence did not conflict with the maxim *res inter alios actæ, etc.* The judgment in *Darling vs. Westmoreland*, delivered by Judge Doe, contains the first carefully-reasoned opinion in favor of the admissibility of such evidence, and shows the historical origin, and therefore the legitimate scope, of the maxim, *res inter alios actæ alteri nocere non debent*. The maxim is shown to have originated in a humane solicitude for the protection of the accused from the penalties of a barbarous criminal code. We find in this opinion the same idea that Professor Thayer afterwards expressed, viz., that the extreme barbarity of the English criminal law reacted and produced anomalous rules of evidence to effect the saving of human life, and that those anomalous rules were ultimately imported from criminal to civil trials. In civil trials, however, the undue multiplicity of issues should be prevented by the sound judicial discretion of the trial judge, not by the irrational exclusion of matter in the highest sense probative. Judge Doe thus states his position:

chester, 6 Cushing's Massachusetts Reports, 396; *Hubbard vs. Concord*, 35 New Hampshire Reports, 52.

When we want to know whether a certain horse is skittish or is capable of a certain speed, whether a certain substance is poisonous and destructive of animal or of vegetable life, whether certain materials are of a certain strength, whether a certain field or a certain kind of soil is likely to produce a certain kind or amount of crop, whether a certain man or brute or machine is likely to perform a certain kind or amount of work, or whether anything can be done or is likely to be done, one way is to speculate about it, and another way is to try it. The Law is a practical science, and when it is appealed to, to direct what means shall be used to find out whether a certain pile of lumber is likely to frighten horses, if any one asserts that, on this subject, the law prefers speculation to experience, abhors actual experiment and delights in guess work, the person advancing such a proposition takes upon himself a task of maintaining it upon some legal rule, distinctly stated by him and well established by the authorities. Such a proposition is not sustained by the reason of the law. It is sustained by nothing that can justly be called a principle. By what technical rule, at war with reason and principle, is it supported?

The only rule relied upon to exclude experimental knowledge in such a case as this, is the rule requiring the evidence to be confined to the issue,—that is, to the facts put in controversy by the pleadings, prohibiting the trial of collateral issues—that is, of the facts not put in issue by the pleadings, and excluding such evidence as tends solely to prove facts not involved in the issue. This rule merely requires evidence to be relevant. It merely excludes what is irrelevant. It is a rule of reason, and not an arbitrary or technical one, and it does not exclude all experimental knowledge. A fact as relevant, and as directly involved in the issue of guilty or not guilty, between these parties, as any fact in controversy, was the likelihood or probability of the lumber frightening ordinary horses. There was nothing collateral—that is, nothing irrelevant, in that. . . .

It has been remarked by Professor Thayer concern-

Equally unmistakable and far-reaching has been the influence of Judge Doe's opinion advocating the admissibility of the testimony of non-expert witnesses to prove sanity or insanity. It has always been a strange and purely dogmatic inconsistency of the common law that, although the subscribing witnesses to a will, not experts and having no previous acquaintance with the testator, were considered competent to give an opinion as to the testator's sanity or

ports, 688. The Supreme Court of Minnesota cited the case with approval and adopted its rule in 1887, *Phelps vs. Winona R. R. Co.*, 37 Minnesota Reports, p. 487. In 1890 the Court of Appeals of New York, *Hoyt vs. N. Y., L. E. & W. R. R.*, 118 New York Reports, p. 405, and the Supreme Court of Vermont, *Tufts vs. Chester*, 62 Vermont Reports, p. 357, cited and applied the doctrine of the New Hampshire case. The Supreme Court of Michigan cited the case approvingly and adopted its principal in 1891, *Lombar vs. East Tawas*, 86 Michigan Reports, p. 21. In 1893 the Supreme Court of Ohio quoted from *Darling vs. Westmoreland, Brewing Company vs. Bauer*, 50 Ohio State Reports, pp. 566, 568. The Supreme Court of Illinois similarly accepted and applied the doctrine of the case in 1894, *City of Bloomington vs. Legg*, 151, Illinois Reports, p. 13. So did the Supreme Court of Colorado in 1895, *Colorado Co. vs. Rees*, 21 Colorado Reports, p. 441. The Texas Court of Civil Appeals cited the case and applied its rule in 1900, *San Antonio, etc., Co. vs. Beyer*, 24 Texas Civil Appeals Reports, p. 147. In only one jurisdiction, to the writer's knowledge, where the case has been cited has its doctrine though applicable been flatly rejected, *Phillips vs. Town of Willow*, 70 Wisconsin Reports, 6. Professor Wigmore has rather understated than overstated the truth when he says that "*Darling vs. Westmoreland*, opinion by Doe, J., is the leading case." Wigmore's note to *Greenleaf on Evidence* (16th edition), vol. I, p. 88, note 20, 1899. The same author further remarks: "There is an increasing judicial tendency to treat evidence of experiments in the spirit of Mr. Justice Doe's utterance; and it can hardly be supposed that the casual erroneous precedents would be regarded as a hindrance." Wigmore on *Evidence*, vol. I, p. 531.

insanity, his servants, acquaintances, and friends, with many opportunities for observation, were deemed incompetent. A strong dissenting opinion combating this dogma was written by Judge Doe in 1866.³⁰ Undaunted he wrote a second and much longer dissenting opinion of about twenty-eight pages in 1870.³¹ These dissenting opinions thus expressed his conception of, and reason for, the true rule:

The admissibility of such opinions seems never to have been doubted in England unless by Coleridge, J. in 5 Cl. & Fin. 690, 691. They are competent because considered in connection with the means of observation on which they are based, they are the best evidence of which the case in its nature is susceptible. From the nature of the subject, it cannot be generally so described by witnesses as to enable others to form an accurate judgment in regard to it. For like reasons, the opinions of non-experts are received as the best evidence in regard to identity, handwriting, age, form, size, weight, measure, strength, speed, time, distance, heat, cold, quality, quantity, number, and a great portion of the most familiar facts and occurrences of common life.

"This view," says Judge Jeremiah Smith, "after having been thrice rejected by the court of which he (Judge Doe) himself was a member, was finally adopted as law by a court from the membership of which he had been carefully excluded, i.e., by the court which existed from 1874 to 1876."³² The case referred to by Judge Smith as adopting Judge Doe's

³⁰ Boardman vs. Woodman, 47 New Hampshire Reports, p. 134 (1866).

³¹ State vs. Pike, 49 New Hampshire Reports, p. 399 (1870).

³² Smith's Memoir, Proceedings of Southern New Hampshire Bar Association, 1897, p. 144.

was the pioneer. We might form an adequate conception of his task if, like the lawyers of the sixties, we attempt to explore that uncleared and perplexing wilderness with only Starkie or Greenleaf, as our guides. Fifteen years before Professor Thayer advanced his thesis that the explanation of the laws of evidence is to be found in the functions of judge and jury in "the jury trial," and that "only by a careful distinction between law and fact can the respective functions of the jury and the court be made plain," precisely the same idea was worked out and applied by Judge Doe in actual decisions. In 1871 he pointed out that we shall find the explanation of many apparent but unreal declarations of law in the English system of, not only informing the triers of the fact as to the law, but also of giving them opinions and suggestions leading to a correct determination of disputed questions of facts.³⁶ In reality judges often merely expressed the conclusions of fact which they themselves would draw from the evidence. Apparently unaided by any prior suggestion, unless perhaps that of Austin,³⁷ Judge Doe worked out this most important and far-reaching explanatory theory, and applied it to the decision of the question, then confronting the Supreme Court of New Hampshire, whether a referee could properly return the finding that a carrier who had received

³⁶ Gray vs. Jackson, 51 New Hampshire Reports, 9.

³⁷ "In numerous cases presumptions *juris et de jure* are purely fictitious. They are resorted to by the courts as a means of legislating indirectly." Austin's Jurisprudence, sec. 26 (4th edition, p. 509).

pay for transporting goods beyond its own line had in point of fact made no contract to do so. The well-known English authority, Muschamp's case,³⁸ held that by a rule of law a carrier who received toll for carrying freight to a destined point had contracted to carry it there, though the point was not on the carrier's own line, and although the evidence was just as consistent with the conclusion that a promise had been made to forward the goods prepaying the toll, as with the conclusion that a promise had been made to carry them to their destination. The New Hampshire court held that despite Muschamp's case the finding of fact should stand and declined to fall into the common error of holding "so plain a question of fact to be a question of law." The main idea of Judge Doe's opinion will appear from the following excerpt:³⁹

When Baron Rolfe told the jury that the evidence in the case was *prima facie* evidence of such an undertaking, by these words he held the undertaking to be a matter of fact to be proved by evidence. In saying that the evidence was *prima facie* evidence of the fact, he merely expressed his opinion of the weight of the evidence, in accordance with the general custom of English judges. . . . In their practice, such opinions are given in various forms. Where we should say, "There is some evidence to be submitted to the jury," English judges often say, "The evidence proves," or "The weight of the evidence is," or "From the evidence the inference is," or "The presumption is," or "This is *prima facie* evidence," or "This evidence shifts the burden of proof," or "This evidence is sufficient to prove the fact unless it is rebutted by the other

³⁸ 8 Meeson & Wellsby's Reports, 421 (1841).

³⁹ 51 New Hampshire Reports, p. 13.

tually admits, that there is no rule of law on the subject. He does not say to the jury, "There is a general rule of law, or a legal presumption applicable to all kinds of property;" but he must say, in substance; "There is a general rule of law which finds guilt from the recent possession of stolen property; but whether the possession is recent or not depends upon the nature of the property. There is no rule of law which divides the infinite varieties of property into three hundred and sixty-five or any other number of kinds, and requires you or me to draw the presumption, from the possession of one kind one day after the theft, from the possession of another kind two days after, and so on to the end of the list; that allotment of time and variety is left to my judgment; and, in my judgment, the time and variety, in this case, are sufficient to raise the presumption: this presumption, found by me, is binding upon you."

It is useless to call such a presumption a presumption of law. Call it what we may, it is a presumption of fact. . . . It is a presumption established by no legal rule, ascertained by no legal test, defined by no legal terms, measured by no legal standard, bounded by no legal limits. It has none of the characteristics of law. . . . Being a presumption of fact, it should according to our practice, be drawn by the jury, and not by the court. . . . When courts thus undertake to decide what is a satisfactory explanation or reasonable account of the defendant's possession, they manifestly express an opinion on the facts and the weight of the evidence, and not on any question of law. . . . These are mere instances and illustrations of the general practice of the judge giving to the jury his opinion on the facts; and this general practice, probably, is the chief origin of the supposed legal presumption drawn from the possession of stolen property.

When judges, following the common practice of giving the jury their opinions of the facts and the weight of the evidence, had charged juries year after year, for a great length of time, that possession of stolen property was presumptive evidence of guilt, or raised a presumption of guilt, this form of judicial

instruction finally came to be considered as the law of the land. . . . Being constantly repeated by the court, it naturally acquired the position and strength of an established dogma. The uniform practice of the judge, giving the jury his opinion on any matter of fact on which he saw fit to aid them in that way, was unquestioned. . . . It was not the practice to inform the jury that they were bound by the opinion of the judge in matters of law but not in matters of fact. The line between law and fact was not drawn as it is now being drawn in this state. The attention of the bar, court, and jury was seldom called to the distinction. . . .

Under various influences adverse to a critical and rigid maintenance of the distinction between law and fact, not only was it the practice for the judge to give the jury his opinion on the facts, but it was recognized by all the authorities as a correct practice. When, for many ages, the court had constantly said to the jury, "There is such and such a presumption;" without making any reference to, or thinking of, its character as a presumption of law or a presumption of fact, how could its true character be understood and preserved? It would have been wonderful if such a uniform and approved practice had not, in the course of time, practically buried or obliterated the dividing line between law and fact, at very many points, and particularly through the region of presumptions and produced great difficulties for those who should endeavor to make partition of what had so long been held in common and undivided, thoroughly commingled and blended together. We are not left to conjecture whether such a practice would be likely to produce such a result. We know it has produced it. We are now contending with those difficulties. The law is burdened and obscured by a great mass of common opinion, general understanding, practice, precedent, and authority (including the presumption from possession of stolen property), that has passed for law, but is in truth not law, but fact, coming down to us largely by descent from the ancient custom of the judge giving the jury his opinion of the evidence. To clear the

law of this incumbrance, revive elementary principles strictly legal in their nature, separate the province of the court from the province of the jury, and maintain the latter in its entirety, is a duty put upon us by the Constitution. . . .

To form even an approximate idea of the critical value and influence of this opinion we must place ourselves in the position of the lawyer of 1869. The legal treatises upon evidence of that day tended more to obscure than to illuminate the difficulties surrounding the subject of the burden of proof and the meaning of the expression, "presumption" when employed in connection with the possession of stolen property, or in any other connection. Professor Thayer's discussions did not appear until twenty years later. He refers to Judge Doe's opinion in *State vs. Hodge*, but without any comment upon Judge Doe's explanation of the presumption as having originated in the custom of giving charges to the jury upon the weight of the evidence. Professor Thayer's vast historical research enabled him to offer the explanation that this presumption of guilt from unexplained possession has a "long historical root, extending to the laws of Ine, King of Wessex in the seventh century," and that in "the old modes of trial when a man was charged with an offense he might be punished unless he cleared himself."⁴¹ The notable fact is that Judge Doe by sheer intuition was able to discern the truth that the possession of stolen goods did not shift the burden of proof. Judge Doe

⁴¹ Thayer's *Preliminary Treatise on Evidence*, pp. 327, 329.

did not have the search-light of elaborate historical research. The acute observations of the *Nisi Prius* judge and of the historical investigator here meet and supplement each other. Prior to 1869 there was scarcely any court holding otherwise than that evidence of recent unexplained possession if submitted to the jury required a verdict of guilty, but where an opposite view prevailed, as in California, Indiana and Tennessee,⁴² there was no explanation of the divergence from the main stream of authority. Judge Doe's decision has exerted a marked influence. The doctrine of the case of *State vs. Hodge*, that the court has no right to charge that the possession is sufficiently recent or sufficiently exclusive or sufficiently unexplained to rebut the presumption of innocence, has been adopted, and the case itself approvingly cited by the supreme courts of a number of states.⁴³ The opinions of Judge Doe in *Boardman vs. Woodman* and *State vs. Pike*, in which he advocated the admissibility of the testimony of non-expert witnesses to prove sanity or insanity, and to which we have referred, are other illustrations of his proposition that the province of the jury to find questions of fact had been encroached upon by judges in giving charges respecting the facts to be found from

⁴² *People vs. Ah Ki*, 20 California Reports, 177; *Engleman vs. The State*, 2 Indiana Reports, 91; *Curtis vs. The State*, 6 Coldwell's Tennessee Reports, 9.

⁴³ *State vs. Pomeroy*, 30 Oregon Reports, p. 25; *People vs. Swasey*, 6 Utah Reports, p. 98; *State vs. Mandich*, 24 Nevada Reports, p. 341; *Van Straaten vs. The People*, 26 Colorado Reports, p. 187; *State vs. Walters*, 7 Washington Reports, p. 246.

the evidence. The illustration is furnished by the judicial definition of insanity as a mental state necessarily dependent upon delusion. Judge Doe contended that incapacitating insanity could exist without delusion. He says: ⁴⁴

The judicial practice of directing or advising juries in matters of fact, has never been discontinued in England. And this practice has carried into reports and treatises, on various branches of the law, many opinions of mere matters of fact. Without any conspicuous or material partition between law and fact, without a plain demarcation between a circumscribed province of the court and an independent province of the jury, the judges gave to juries, on questions of insanity, the best opinions which the times afforded. In this manner, opinions purely medical and pathological in their character, relating entirely to questions of fact, and full of error as medical experts now testify, passed into books of law, and acquired the force of judicial decisions. Defective medical theories usurped the position of common-law principles.

The usurpation, when detected, should cease. The manifest imposture of an extinct medical theory pretending to be legal authority, cannot appeal for support to our reason or even to our sympathy. The proverbial reverence for precedent, does not readily yield; but when it comes to be understood that a precedent is medicine and not law, the reverence in which it is held, will, in the course of time, subside.

The legal profession, in profound ignorance of mental disease, has assailed the superintendents of asylums who knew all that was known on the subject, and to whom the world owes an incalculable debt, as visionary theorists and sentimental philosophers attempting to overturn settled principles of law; whereas, in fact, the legal profession were invading the province of medicine, and attempting to install old exploded medical theories in the place of facts established in the progress of scientific knowledge.

⁴⁴ 49 New Hampshire Reports, p. 438.

The invading party will escape from a false position when it withdraws into its own territory; and the administration of justice will avoid discredit when the controversy is thus brought to an end. Whether the old or the new medical theories are correct, is a question of fact for the jury; it is not the business of the court to know whether any of them are correct. The law does not change with every advance of science; nor does it maintain a fantastic consistency by adhering to medical mistakes which science has corrected. The legal principle however much it may formerly have been obscured by pathological darkness and confusion of law and fact, is, that a product of mental disease is not a contract, a will, or a crime. It is often difficult to ascertain whether an individual had a mental disease, and whether an act was the product of that disease; but these difficulties arise from the nature of the facts to be investigated, and not from the law; they are practical difficulties to be solved by the jury, and not legal difficulties for the court.

If our precedents practically established old medical theories which science has rejected, and absolutely rejected those which science has established, they might at least claim the merit of formal consistency. But the precedents require the jury to be instructed in the new medical theories by experts, and in the old medical theories by the judge.

Professor Thayer has frankly enough credited Judge Doe with having perceived that the province of the jury has been invaded by the judicial definition of insanity.⁴⁵ But should Judge Doe be credited with merely having given one illustration of judicial usurpation—the judicial definition of insanity? Was he not rather the first to direct attention to one of the hidden forces of the evolution of the English common law. An historian of physical sci-

⁴⁵ Thayer's Preliminary Treatise on Evidences, p. 213.

to Professor Wigmore's appellation, "Master in the Law of Evidence," than his mode of grappling with this subject in a dissenting opinion delivered in 1866 on the subject of the burden of proof under the plea of payment in *Assumpsit*. Dissenting from the majority of the court, who ridiculed his idea as "*a speculative novelty*," Judge Doe contended that where the plea was "payment," and the evidence tended to prove a payment before or on the day, and hence a performance of the contract, the burden of proving non-payment rested upon the plaintiff. In his opinion will be found an exhaustive critical discussion of that fallacy of confounding the literal with the legal affirmative, to which Greenleaf had given such an increased circulation. The opinion contains the following analysis of the burden of proof and is, the writer believes, the first clear, vigorous statement, upon a comprehensive examination of authorities, of the now universally-accepted but then scarcely recognized doctrine that the mere affirmative form of a proposition (e. g., payment) is no criterion of the obligation of maintaining it.⁴⁷

There is, generally, great indefiniteness and ambiguity in the use of such terms as "*prima facie* evidence," "*prima facie* case," "presumption," "*prima facie* presumption," "*prima facie* inference," and "presumptive evidence," . . . and the burden of proof is sometimes said to be on the defendant when the meaning is, that, in fact, the defendant will lose the verdict, unless he offers evidence to balance the plaintiff's evidence. . . .

⁴⁷ Kendall vs. Brownson, 47 New Hampshire Reports, p. 201 (1866).

The practical necessity of adducing evidence to counteract the effect produced upon the minds of the jury by a *prima facie* case, cannot be confounded with the legal necessity of sustaining the burden of proof, without destroying the broad distinction between establishing an equilibrium and establishing a preponderance of the evidence. "Presumption" is frequently mentioned when it does not appear whether it is an inference of law to be drawn by the court, or an inference of fact to be drawn by the jury. And "legal presumption" is sometimes used when "*prima facie* case" is intended. . . . In practice, in this State, the plaintiff is said to make a *prima facie* case when he introduces some evidence, however slight, tending to sustain his burden of proof so that he cannot be non-suited. And if his evidence is so strong that a verdict against it would be set aside, or if upon the plea, or the oral admission of counsel, a legal presumption is raised in his favor, he is said to have a *prima facie* case. . . . In the absence of any matter in avoidance or discharge, the fact to be proved remains the same. Anything affirmed by the plaintiff as the foundation of his claim he is bound to sustain by proof in all stages of the trial. The burden of proof and the weight of the evidence are two very different things; the former remains on the party affirming a fact in support of his case, and is not changed in any aspect of the cause, unless by a legal presumption; the latter shifts from side to side in the progress of a trial according to the nature and strength of the proofs offered in support or denial of the main fact to be established. . . .

If the defense in this case had been payment made after breach, it would have been in confession and avoidance, admitting a breach and setting up the new, distinct, affirmative fact of subsequent payment in discharge of a cause of action which once existed; the burden of proof would have been on the defendant, and his evidence would have been received under the general issue only by a relaxation of the strict rule of pleading. . . .

Four years later, in 1870, appeared the following

English squires, enforcing the game laws of England.⁴⁹

For the attempt to establish an exception changing the burden of proof on the ground of the difficulty and facility of furnishing proof, we seem to be largely if not wholly indebted to a rigorous enforcement of the English game laws, and the undue influence of a small governing class asserting their superior rights under peculiar institutions not brought to this country and hostile to our system of society. The authorities supporting the exception, rest upon game-law precedent. But what the game-law precedent rests upon, aside from the oppression of the peasantry and common people of England in former times, is not so clear. Obscure in its early history, it may have been founded on an inference of fact, or a misapprehension of the affirmative of the issue. It may have been devised by the oppressors for their own convenience. . . . When, in a prosecution on the game laws, it was charged that the defendant had killed a partridge, the defendant then and there not having the necessary aristocratic qualification, the burden was put upon him to prove that he did not belong to the inferior class of men disabled by law to kill game. . . . But when a penalty was claimed of a sailor on the charge that he had left his ship, not having the necessary qualification by license in writing, the burden was not put on him to prove he had a license, but on the other party to prove no license. . . . And if, in an action brought by a clergyman to recover a benefice, it was a necessary part of his case that he had the qualification of having subscribed the XXXIX Articles in the presence of the Bishop of Durham, the burden was not put on the plaintiff to prove this affirmative part of his case, but on the defendant to prove the negative. . . . The prosecutor was relieved of the burden of proving the want of qualification alleged by him at the expense of the game killer; the party claiming a penalty, was not relieved of the same burden at the expense of the sailor; while the burden

⁴⁹ 49 New Hampshire Reports, pp. 569, 570, 577, 581, 582.

of proving his own qualification alleged by himself, was taken from the clergyman and cast upon his opponent. In the triangular conflict of these cases, each of them is supported by other cases. There is an exception against the qualification of a man to kill a partridge; and a legal presumption in favor of the qualifications of a man to administer the ordinances of a state church; and no exception or legal presumption for, or against, the qualification of a man to leave a ship. . . . If there could be one rule for game killers, and another for sailors, and another for clergymen, the application of these clashing regulations to other classes of men, would be perplexing. . . . The simple, plain, methodical, and sensible system of the common law, is composed of a few elementary principles. To these have been added presumptions, exceptions, fictions, and refinements, excessively multiplied and extended in intricate and attenuated forms, with a great amount of fact wrongfully converted into law. The labyrinth of authority, already vast and dark, and rapidly growing vaster and darker, is beginning forcibly to suggest the necessity of recurring to fundamentals. . . . The game-law exception, having been established, was extended to a few other cases; but as it stands in the books, it has no consistent or satisfactory foundation in principle or authority. It has been extended to the liquor laws of this State. . . . The tithe payer was resisting a privileged class who were helped by a dispensation called a presumption. The common people, prosecuted for killing game, also resisted a privileged class; but the presumption which relieved the clergy, would have put the burden of proof on the game-killing aristocracy in their prosecutions of the lower orders, and in their cases, instead of the presumption, an exception was employed. The means were various and conflicting; the result was uniform; the powerful were relieved of the burden of proof, at the expense of their inferiors in rank, fortune and influence. Such things as these, our emigrant ancestors intended to leave behind them when they came to New Hampshire. An English misunderstanding or perversion of the common law, is not necessarily our law.

The erudite and exhaustive treatise of Professor Wigmore upon Evidence bears this dedication:

To the memory of the public services and the private friendship of two Masters in the Law of Evidence, Charles Doe of New Hampshire, Judge and Reformer, and James Bradley Thayer of Massachusetts, Historian and Teacher.

A critic in the *Harvard Law Review*, referring to this dedication, in reviewing the treatise takes exception to giving Judge Doe the first place in the dedication. "Most of Professor Thayer's pupils," says the writer, "would probably place him before Judge Doe in such a dedication."⁵⁰ This assertion is doubtless quite true. But the significance of the fact that the one pupil of Professor Thayer who has produced a monumental work on Evidence places Judge Doe's name before that of the distinguished professor at whose feet the author had sat, is one which will not escape the notice of impartial lawyers. Those familiar with the work of the great reformer and that of the great historian, will believe that this dedication was not dictated by mere personal friendship.

In the territory of substantive law Judge Doe's work covers the widest conceivable range. In no particular region was he such a pioneer as he was in the field of practice and evidence; but wherever his love of investigation and criticism led him to prospect he discovered some new vein of high-grade ore. He was an engineer who was never deterred

⁵⁰ *Harvard Law Review*, vol. XVIII, p. 478.

or controlled by previous reports, however authoritative, from making his own explorations whenever he believed that accepted views were at war with reason. His opinions generally contain an accurate analysis of all the prior cases on the point involved, even where they are not original in their presentation of argument and illustration. In no particular field, therefore, outside of the field of evidence and remedial law, can he be called a specialist. He was a specialist on certain topics in many fields. When cases arose presenting a promising territory for examination in any region of the law, he devoted himself to that particular field with a concentration which left him no time for writing even adequately long opinions in cases of minor interest. This propensity for writing opinions of inordinate length explains some of his extremely short opinions; some of these contain fewer words than the syllabus. His love of research led him into the most diverse regions of the law, and his opinions, therefore, will be found to treat of novel and interesting questions in constitutional law, corporation law, the law of real estate, negligence, documentary construction, including under the latter topic the interpretation of statutes and wills. Outside of New Hampshire many of these opinions have had a marked effect.

In the field of constitutional law his most interesting piece of work is probably an opinion in Dow's Case⁶¹ discussing the Dartmouth College Case and

⁶¹ 67 New Hampshire Reports, 1 (1886).

tures to repeal charters. Chief-Justice Shaw once remarked concerning the reservation clause that "this power must have some limit, though it is difficult to define it." In Dow's case Judge Doe has boldly essayed to give this definition. Mr. Justice Bradley remarked in his dissenting opinion that, "the reserved power is simply that of legislation—to alter, amend or repeal a charter." But the opinion in Dow's case is more explicit and distinguishes between valid legislation, meaning thereby acts of the Legislature operating under constitutional safeguards upon all property whether held by individuals, or owned by individuals though held in a corporate name, and in contrast therewith, unlawful legislation, meaning thereby any unconstitutional act, even though in the form of a charter amendment, designed to alter contracts or to wrest property from its true owners without due process. Constitutional legislation, as defined by Judge Doe, includes the power absolutely to repeal a charter, the power of eminent domain, of police, and (if the question were still an open one in the federal courts) taxation—all sovereign powers of the state to which all property is subject.

It is now admitted by the Supreme Court of the United States that legislation, though in the form of an unqualified repeal of the charter, cannot include the power to deprive the shareholders upon dissolution of any of their property. Judge Doe's position is that this right of property would be

wrongfully taken from any shareholder if, without his consent, a majority, though under legislative permission, were permitted by the court to break their agreement to conduct one kind of an enterprise and to substitute another agreement to conduct another enterprise in its place. Instead of being a sharer in the profits of an enterprise carried out in accordance with the plans agreed upon by all, the shareholder would become, contrary to his consent, a party to a new contract assented to by less than all, and under which he would be merely a recipient of rent. If, as is now everywhere agreed, a legislature under the reservation clause cannot confiscate the accrued profits of corporate enterprise, upon what rational basis of distinction, Judge Doe asks, can a legislature substitute less favorable terms in a contract between the corporation on one side and the state or nation on the other, or change the agreement which has been made between the stockholders as to the object of their enterprise?

If space permitted it would be interesting to discuss Judge Doe's opinions on the "test of partnership;"⁵⁴ on the rights of minority stockholders;⁵⁵ his position that an owner of land may be deprived of

⁵⁴In his opinion in *Dow vs. Railroad*, 67 New Hampshire Reports, p. 9 (1886), he followed the leading English case of *Cox vs. Hickman*, 8 House of Lords Cases, 268 (1860), in repudiating profit-sharing as the test of partnership, saying that associates in business, when partners, are so "not because they share profit and loss, but because the business is theirs, and is carried on for them by their agents."

⁵⁵*Dow vs. Railroad*, 67 New Hampshire Reports, 1.

his property though the land is not actually taken;⁵⁶ his ideas of equality of taxation;⁵⁷ and his theory of the proper interpretation of documents.⁵⁸ We shall, however, perforce conclude with a reference to his decision in *Concord Company vs. Robertson*⁵⁹—a typical illustration of his judicial attitude and theories. Then too, of all the judgments which the Chief-Justice rendered concerning the rights of property this case is locally the one of most far-reaching and practical importance. The case decided that by the common law of New Hampshire the people of the state are the owners of all great ponds and lakes within her borders, and that a great pond or lake is one of ten acres or more in extent. The law of England has always allowed private ownership of natural bodies of fresh water irrespective of their size. The actual decisions, however, have concerned waters lying in Great Britain and Ireland. The problem confronting the New Hampshire court in 1889 was to find a basis for distinguishing between those immense bodies of fresh water like Lake Winnipiseogee or Sanbornton Bay, and the numerous ponds of five or ten acres located throughout the state. The determinant being of necessity acreage, what number

⁵⁶ *Thompson vs. Androscoggin Co.*, 54 New Hampshire Reports, 545 (1874).

⁵⁷ *Edes vs. Boardman*, 58 New Hampshire Reports, p. 588 (1879); *Boody vs. Watson*, 64 New Hampshire Reports, 162 (1886).

⁵⁸ *Delancy vs. Insurance Co.*, 52 New Hampshire Reports, p. 588 (1873).

⁵⁹ 66 New Hampshire Reports, p. 18 (1889).

of acres should constitute a private, and what a public pond? No satisfactory statute could be found on which to base the distinction. The following judicial definition of a public or "great" pond in New Hampshire given by Judge Doe is, therefore, a definition based on the local common law.

The dictates of justice and reason, which retain in the government, for common use, the fee of large ponds, and the shores and arms of the sea (and in some states, large fresh rivers), have vested a reasonable private right of using this public property in the owners of the adjoining land. . . . This right is not bounded by low-watermark. For shipping purposes in Portsmouth, it is reasonably necessary that wharves should be built from the upland, not only across the land uncovered at low tide, but also beyond it. . . . An abutter's use of the bed of a public water, like a riparian owner's use of a fresh river flowing over his land, is governed by the rule of reasonableness applied to the facts of his case. . . . If due weight is given to the axiom that common law grows out of the institutions and circumstances of the country, the conclusion is unavoidable that the rights of abutters and the public in American public waters are the whole property, and not merely what was left for the subjects of the realm by the ancient monopolies of the English executive and the manorial lords. . . . In this state, the manner in which and the extent to which the bed of a public water can be reasonably appropriated to the exclusive use of a littoral proprietor is determinable on a bill in equity. . . .

In this state, free fishing and free fowling in great ponds and tide-waters have not needed the aid of a Statute for the abolition of written or the declaration of unwritten, law. So far as the Ordinance of 1641 introduced or confirmed these liberties, it was an enactment of New Hampshire common-law. . . .

There would be a distinction between public and private ponds if the ordinance had not been passed, and the common-law

incisive language of Judge Doe; "As there was a time when no precedents existed, everything that can be done with them can be done without them."⁶² The baseless fiction denounced by Bentham and Austin but forming the substratum of all common law decisions, that the rules of the common law have existed from immemorial antiquity and that the duty of a judge is only to state them, never seduced the mind of Judge Doe one instant. Early in his judicial career he grasped, as few have grasped, the conception that Lord Coke's maxim is both historically accurate and of far-reaching everyday utility—"Reason is the life of the law." In Judge Doe's philosophy of the common law, precedent generally should guide its growth, but the growth is due to the vital force of reason. He ever realized that the only answer to Bentham's gibe at judges who, professing only to declare the law yet make it, was to recognize with Austin the historical truth that by the course of the common law itself judges do make rules of law in cases where no satisfactory precedent exists, conforming these rules to their highest ideals of justice and reasonableness. In this aspect the case of *Concord Co. vs. Robertson* has a deeper and far more extended importance than a mere declaration of New Hampshire piscatory rights. The piscatory

⁶² See also Judge Doe's remarks in *Lisbon vs. Lyman*, 49 *New Hampshire Reports*, p. 602: "The maxim which, taken literally requires courts to follow decided cases is shown by the thousands of overruled decisions, to be a figurative expression requiring only a reasonable respect for decided cases."

question is a mere incident to the judicial assertion of a fundamental legal principle—the right of a common law court to declare the unwritten law either upon or apart from any evidence or tradition, to pronounce that law if need be, upon no other authority than the court's own ideals of justice and reasonableness. The genius to comprehend with Austin and Bentham this half-forgotten but catholic and eternal truth of the common law world, the audacity to apply it against the would-be monopolizers of a New Hampshire lake at the end of the Nineteenth Century compels our admiration. The decision recalls to our minds the confidence of Chief-Justice Coke in the judicial power when he denounced royal proclamations as repugnant to the common law. With identity of purpose these two great common law judges assert their prerogative to pronounce the common law with no other foundation for the rule they formulate than its accordance with their own ideas of reason and justice.

Though our admiration may be aroused by the boldness of this opinion, the reader will perhaps agree with the writer that the pretended reasoning advanced for the conclusion is unsound. The reasoning that the ordinances might be evidence of a provincial custom is equivocal, for the ordinances are as consistent with a declaration as with an annulment of the prior common law of the Province. Nor is the non-committal nature of the opinion as to the territorial operation of the ordinances satisfactory;

suggesting that the latter write a dissenting opinion in which he would agree to concur. A few days later Judge Doe would hunt up his companion and guide him to the anxious seat by suggesting new doubts and difficulties besetting the path of dissent and now apparently for the first time troubling his own mind. Finally after much struggling and wrestling he would effect their joint conversion.

Nor could a correct picture of the Chief-Justice be presented without indicating the keen and lively interest that he took in every important question before his court, whether he himself or an associate prepared the opinion. His correspondence with other members of his court on the subject of pending questions of law probably consumed thousands of reams of paper. When an associate was preparing an opinion Judge Doe made constant suggestions of lines of argument, of analogies and authorities. He inspired many of the decisions appearing under other names. Indeed if tradition be accepted he has in some few instances literally inspired the opinions of others. There are certainly three opinions appearing under other names which point to him and furnish conclusive evidence of their paternity. His motive was doubtless an intense zeal that every point relating to the subject should be stated in the clearest and most effective way for future as well as present use. Perhaps, too, he desired that his own hand should not too frequently appear. For twenty years he sat watching the docket to prevent the recording

of irreconcilable precedents or troublesome *dicta*. No case, small or large, escaped his eye. He was a great demolisher of legal fictions, but no greater fiction was ever invented in the dark ages than the one often appearing in the New Hampshire Reports—"Doe, C. J., did not sit."

The foregoing attempt to describe his intellectual activities should not be concluded without the statement that he was not a widely-read man. He was not a student of history or social science. He never read literature for rest or recreation. It is well-known that he continually conned the pages of Roger's Thesaurus and of Hill's Rhetoric. Though the large vocabulary Judge Doe employed and the skill with which he employed it, makes quite difficult of belief the assertion of Judge Jeremiah Smith:⁶⁵ "I believe it to be the fact that in his whole life he read only one novel, and not more than three other books outside of his special studies," we must, however, remember that iconoclasm and the revolutionary passion for abstract justice is never accompanied by devotion to history and literature. No more striking illustration of that truth can be found than in the antagonistic mental attitudes of his associate Judge Carpenter and of Judge Doe.⁶⁶

⁶⁵ Smith's Memoir, Proceedings of Southern New Hampshire Bar Association, 1897, 150.

⁶⁶ See the very interesting comparison of the views of Judge Doe with those of Judge Carpenter by Hon. Edgar Aldrich, Proceedings of Southern New Hampshire Bar Association, 1899, pp. 311-323. Judge Doe received the degree of Doctor of Laws from Dartmouth College in 1873.

The reader will perhaps be interested to know what manner of man he was, to know something of his manners and conduct, of his qualities of heart. Enough has been shown of his love of justice. Equally strong were his kindness and charity to all men. Criminals always appeared to him as the natural product of their environment. In criminal trials he was more anxious to be merciful to the unfortunate than to execute justice exactly. Judge Jeremiah Smith thus refers to his "great charity for the failings of others:" "He could put himself in the other man's place and realize the obstacles in his path. I once made a sarcastic remark to him about the conduct of a man of generally high character, who seemed to be in one instance unduly influenced by personal friendship. His reply was simply: 'Lord, lead us not into temptation.'" He was kind and encouraging to young practitioners, trying to ascertain the merits of their cases however indifferently or timidly they were presented. Though to the older practitioner who had learned the road and was employing technicalities to defeat justice Judge Doe's interruptions could be as disconcerting as lightning bolts. When learning that a student at law had lost his preceptor, Judge Doe of his own motion sent a prominent member of the bar to volunteer his assistance in any difficulties or perplexities that might arise. He did many such small acts of kindness. His shrewd knowledge of human nature enabled him to say to those in doubt and difficulty

exactly the helpful word of advice. To a newly-appointed associate who had become disheartened by the adverse criticism of his opinions made by the other members of the court and the difficulties of the new experience, Judge Doe wrote: "When I reflect upon the ignorant audacity with which I first approached the duties of a judge of the Supreme Court of New Hampshire, I am appalled."

He was approachable and always willing to answer letters of inquiry from members of the bar; his cheerful, friendly, invigorating letters written in a thoroughly conversational style, in a hand clear and distinct yet curiously abbreviated and compressed, are models of the art of correspondence now fast disappearing. In his letters upon questions of law, he could be absolutely non-committal and yet thoroughly helpful and suggestive.

He had that keen sense of humor which in the intellectual man is a sort of perpetual mental regeneration. He never took himself so seriously that he could not appreciate a joke of which he was himself the subject. "I doubt," says Judge Smith, "whether any one enjoyed more than he the well-known story as to the advice given by an eminent lawyer to the examining committee of the Grafton bar; advice which (as Judge Doe himself said) so clearly marked the learned counsellor's utter contempt for the court." The story was this: An applicant for admission to the bar had presented very satisfactory certificates of proficiency and had served an apprenticeship with a

practitioner of the highest standing. His paper was, however, incredibly deficient in the opinion of the committee, and they decided to lay the case before the late Harry Bingham, Esq., to get his advice. After carefully reading the student's answers and solemnly pondering the subject, Mr. Bingham observed with much deliberation: "Gentlemen, according to my conceptions of the law this young man's views on the points to which he has answered are startling, but on the whole I would recommend, if I were you, that he be admitted and let him have a hack at the Supreme Court, and God only knows but what he would convince them he was right."

Judge Doe always affected a profound ignorance of political affairs. He repeatedly professed that he did not even read the newspapers. As a matter of fact, he took the liveliest interest in politics—an interest not unnatural in one who had been legislated out of a county solicitorship in 1856; out of an associate-justiceship in 1874 and then back again into a chief-justiceship in 1876. He subscribed to some half dozen newspapers—American and English. After his change from Democracy to Republicanism in 1859 he remained intensely loyal to his party and made very liberal contributions to its campaign funds. He had great genius for political intrigue and, though no bill of particulars concerning his political activities can be furnished, politicians speak mysteriously of "his wonderfully active and original mind in matters of large public concern," and of

"his instrumentality in several matters of the first order which were discussed during his time." The writer has found no reason to believe that any of his judicial opinions were influenced by political bias. If, however, he wanted a statute enacted by the Legislature, his hand though invisible, could generally move the pawns. He seldom, however, accomplished his ends in this manner, having always at his hand a much easier solution of difficulties by declaring judicially what with great felicity and equal facility he was pleased to call "the New Hampshire common law." When he had reached a conclusion upon any question he was impervious and indifferent to all criticism whether of the bench, the bar, the newspapers, or the public. A story is told, which is not capable of verification yet is thoroughly characteristic. He is said to have met an old friend on the street at the time when the court was undergoing most violent newspaper abuse for the decision in Corbin's case that the state had relinquished its right to repurchase the Concord Railroad at cost.⁶⁷ His friend ventured to inquire how the judge enjoyed his punishment. Judge Doe asked, "what paper?" On receiving the reply that the paper was the Concord Monitor he answered, "Oh! is that paper published now?" and walked on. Similar anecdotes showing his indifference to abuse could be multiplied.

⁶⁷ Corbin's case is reported under the title, "Opinion of the Justices," 66 New Hampshire Reports, p. 629 (1891).

In his manners and dress the most conspicuous characteristic was extreme simplicity. He always lived on his estate and worked on his farm to obtain exercise. The beatitude pronounced by the Roman poet upon the man *qui procul negotiis exercet rura paterna ut prisca gens mortalium* Judge Doe merited by an alternating system of working with the pen and the hoe. The pomp and circumstance of judicial power his soul abhorred. His court was opened and adjourned without the ancient formulæ and without the sheriff's invoking salvation for the court and the state. The sheriff's prayer like other prayers were considered by Judge Doe as a "useless waste of words." Thus, on one occasion he intimated to a sheriff that the opening prayer should be as short as it could properly be made. The minister entered into the spirit of the request and offered the following prayer:

O, Lord, bless this Court, bless these lawyers and let them understand that life is short and time is fleeting and not to be spent in empty declamation. For Christ's sake. Amen.

Judge Doe expressed his satisfaction to the minister.

His extreme views upon the subject of simple living he put most in evidence by always dressing in the costume of a farmer at a county fair. As a youth, Judge Doe having ample means, gratified his desire for fine clothes by appearing in an elegant attire which amounted almost to foppery. Before his appointment to the bench and until the day of his death

he wore clothes of georgic simplicity. When on circuit as a young judge he much enjoyed being taken for a juryman or a farmer "with a case in court." No reasonable man could have drawn any other inference from the evidence. The Judge was accustomed to mix with the crowd attending court, and, with his hands in his pockets, chatted freely with everybody. Owing doubtless to some organic weakness he was very dependent upon fresh air and would conduct trials with the windows removed even in the coldest weather. He allowed all present to wear hats and overcoats, and he once ordered the sheriff to provide a horse-blanket for a juror who was cold. As chief-justice he made little concession to conventional ideals of judicial dress and of dignified deportment.

Had the reader visited Concord in 1893 during the June session of the "Law Term" of the Supreme Court and entered the Eagle Hotel, he would probably have given no more than a passing glance to an elderly unassuming man of medium height, slightly bent, his beard shaggy and grizzled. He might have been a country store-keeper, a farmer, or a lumberman. He wore a sort of brown frock coat, coarse trousers, and heavy boots or brogans, which showed no trace of blacking. An old tattered straw hat completed the ordinary summer costume of the Chief-Justice of New Hampshire. In winter he frequently wore a dark blue cloth cap with laps to pull down over the ears; and he wore in court a

coarse rug which onlookers insist was a horse-blanket. It was said by one of his associates that at the funeral of the late Chief-Justice Bellows when the other justices wore black kid gloves, and with Judge Doe carried the coffin, he wore blue and white mittens. Judge Doe's motives for these unconventionalities of dress were probably different at different periods of his life. General Marston used to assert that "Doe is demagoguing," and to this charge when applied to the early part of his career a verdict of guilty should probably be entered. At first extremely unpopular with the bar he desired to win the confidence of the people and to make them believe that he was one of them acting as their judicial agent in their behalf. A different motive was undoubtedly present in his later life. As strong as was Judge Doe's love of reasonableness and justice in the administration of the law, so strong was his hatred of the vulgar extravagance of many of the wealthy, and, being a firm believer in a democratic form of government he feared that eventually a political inequality would result among men who though constitutionally equal were financially unequal. Though an aristocrat in his intellectual companionships he was an ardent democrat in his assertion and vindication of the rights of the average citizen. By his dress and habits he entered his protest against the vulgar display of wealth, and by setting an example to his family and neighbors of plain living and high thinking he tried to show in

the most practical way that such thinking and living were entirely compatible.

But if the reader, after the imaginary encounter in the Eagle Hotel, had wandered into the Supreme Court Room he would have seen the same elderly gentleman presiding over the full bench with a dignity and power that would have instantly dispelled all thought of his attire. In court he appeared every inch a judge. No one who has witnessed the intellectual homage which his genius compelled; who has stood before the bar and faced the rapid fire of his penetrating questions; who has felt the subtle grasp of his brain, its intuitive power of anticipation; who has been whirled by him through syllogism to syllogism; who has heard his crisp, snappy, shrill voice delivering opinions in which there was no note of uncertainty; who has listened with a thrill to the boldest logic expressed in the most ingenious and captivating rhetoric, has ever thought much about Judge Doe's eccentricities or clothes. The fact most vividly stamped upon our memories is the supremacy of his mind, the inferiority in close combat of other minds. At the Bar meeting in memory of Judge Doe, the late Mr. Frink happily and truly said, "Judge Doe had his eccentricities as we all know, they neither added to nor detracted from his greatness. . . . He was great and good over and above his peculiarities."⁶⁸

⁶⁸ Proceedings of Southern New Hampshire Bar Association 1896, p. 88.

To exaggerate his influence upon the jurisprudence of New Hampshire would probably be impossible. There his name is synonymous with a revolutionary epoch in the administration of law. New Hampshire lawyers would not hesitate to apply to him Lord Campbell's eulogy of Coke—"The greatest oracle of our municipal jurisprudence." In his own state Judge Doe found reason disseized of much of her dominion over the common law; precedent and formalism had usurped her place. In many instances he restored reason to her customary sovereignty and reduced form and precedent to their proper vassalage. His ideal of jurisprudence combined these qualities—justice, reasonableness, simplicity and cheapness. In the main he realized his ideal. But to realize it, he quite often sacrificed the no less essential and common law quality of certainty—which, said Lord Coke, "is the safety of all." To compare and contrast him with other great common law judges in the Old and in the New England and other states of the American Union and finally to assign him to some imaginary niche between well-known English or American judges would be a task as difficult for the writer as the result would be unsatisfactory to the reader. But if a comparison should be attempted his peers must certainly be sought among those few who have profoundly revolutionized existing ideas of common law administration and of the law of evidence, who have guided us by historical researches to the birth of legal con-

ceptions and have skilfully separated legal truth from the matrix of circumstance.

In all the array of judges who have administered the common law none can be found who has so clearly pointed out the judicial duty of subordinating legal machinery to legal rights. The purpose of this essay has been attained if it has been shown that even outside his own state other judges have often been influenced by his genius for legal reform and have followed where he led. His arduous judicial labors, *lucubrationes triginta annorum*, will long remain an inspiration to toil unsparingly for the improvement of the common law.

1



WIRT DEXTER.

1831-1890.

BY

FRANKLIN HARVEY HEAD,

of the Illinois Bar.

WIRT DEXTER, for many years, and in many ways doubtless, the premier of the Chicago Bar, was born in Dexter, Michigan, October 25th, 1831. His education was conducted partly at home and in the academies of Michigan, and partly at Cazenovia Seminary, New York, from which latter institution he was graduated after a course of study substantially the same as the usual college course of fifty years ago.

Mr. Dexter was twice married, first to Miss Catharine Dusenberry of Marshall, Michigan, in 1858, who died in 1863, and who was the mother of one child which died in infancy. He was married in 1866 to Miss Josephine Moore. Two children were born to them: Samuel Dexter, a graduate of Harvard, who died while a student in its Law School; and Katharine, some seven years younger than her brother, now Mrs. Stanley McCormick, of Chicago. Mr. Dexter died suddenly on May 17th, 1890, of angina pectoris.

Wirt Dexter was of a family honored and illustrious in the legal profession in America. His grandfather, Samuel Dexter, was Secretary of War, and afterwards Secretary of the Treasury, in the cabinet of President John Adams. He was a vigorous advocate of the adoption of the Federal Constitution, a personal friend of Alexander Hamilton, and was known as the "Great Expounder of the Constitution," long before the same title was won and worn by Daniel Webster. His son, Samuel W. Dexter, was appointed United States District Judge of the Territory of Michigan, and founded the town of Dexter, where his son Wirt was born. A brother of Judge Dexter was Franklin Dexter, a contemporary of Daniel Webster, who was often associated with, or pitted against him, and was everywhere recognized as, in legal acumen and ability, the peer of the great orator.

With the blood of a line of eminent lawyers in his veins, Wirt Dexter would naturally choose the profession of the law as the work of his life. His father was a man of considerable means, which he had largely invested in agricultural and pine lands in the State of Michigan. Before leaving home, the son had, in large degree, the management of his father's business, and for some time after locating in Chicago for the study and practice of the law, he was interested in the manufacture of pine lumber, and handled the product of his mills in the Chicago market, as well as organized and equipped his winter log-

ging camps. This training in active business affairs was of the greatest advantage to him in professional life. His knowledge of commercial law and usage was not derived at second-hand from the study of books, but was from an active and interested mingling with men of affairs. In a new country, the legal questions which arise are largely of a commercial character, and Mr. Dexter's practical experience made him a safe, prudent and reliable adviser. His professional life was spent entirely in Chicago, although for several years prior to his death he filled the positions of general solicitor and member of the executive committee of the board of directors of the Chicago, Burlington & Quincy Railroad Company, the duties of which position usually called him for some months annually to Boston.

While a most diligent worker in his profession, his early training gave him an inclination for business affairs. He was from a young man interested in Elk Rapids, Michigan, where he had a sawmill, and with others was afterward engaged in the manufacture of lumber and charcoal pig iron. He was also a large owner of pine land in Michigan and Louisiana, as also of residence and business property in Chicago.

From his practical experience, he distrusted the ordinary methods of charitable work, and at once after the great Chicago fire, in 1871, he was active, with others, in the organization of the Chicago Relief and Aid Society and in securing for this society the position of almoner of the benefactions of the

Another characteristic was his high regard for the office and dignity of the courts. He realized often, as all lawyers do, that judges are but men and fallible like other men, but he also felt that the courts are the best invention the wit of man has yet devised to do justice between man and man, and respected them according to the dignity of their office. His bearing toward them was always courteous, and at the same time self-respecting, never forgetting that he, too, was a part of the court, and interested in sustaining its proper weight and dignity.

He had been, and to the end of his life continued to be, a hard student in the learning of his profession. His mind was richly stored with the light books could afford him, and he could cite authorities copiously when needed. But he depended after all for his success mainly upon a certain practical common-sense, with which he was largely endowed, for the solution of his most complicated cases. His first and main effort was to obtain a full and minute knowledge of the facts of his case. These he arranged in a logical order of statement, so clear and lucid that no rhetoric or trick of words could add to or detract from their force. His diction was well chosen and to the point; his manner frank, confident and forcible, rich with apt illustrations to clinch or enforce his own arguments, or answer and confound those of an opponent.

One of the most interesting and widely-discussed cases in which Mr. Dexter had the principal part is

known as the case of *Blatchford vs. Newberry*.¹ Walter C. Newberry, who died in November, 1868, left an estate amounting to about \$5,000,000, and disposed of the same by will dated October, 1866, substantially as follows: He gave to his wife the homestead in Chicago, with its appurtenances, and an income of \$10,000 per year for the term of her natural life; he gave the bulk of his estate, subject to this charge, to his two daughters, and to their children, in case either were married and bore children. In the case that both daughters, who were his only children, died without issue, he gave one-half of his estate to endow a free public library in Chicago, and the other half to his nephews and nieces, of whom there were a considerable number. The division of his property into these two parts was to be made after the death of his wife, as the whole estate was held for the purpose of securing to his wife the income named. The two children died within a few years after the father's death, neither having been married. The widow, under advice of counsel, renounced the provision made for her under the terms of her husband's will, and chose to take her dower and legal share in the estate under the statute. The trustees under the will thereupon made a full and final settlement with Mrs. Newberry, giving to her one-third of the personal property of the estate, and the income of certain designated real estate which it was mutually agreed would represent her full dower

¹ 99 Illinois Reports, 11.

interest in the estate. After this settlement had been made with Mrs. Newberry, a suit was brought on the part of the nephews and nieces for an immediate division of the estate. Mrs. Newberry having been settled with in full, it was claimed that there was no occasion to defer the division of the remainder of the estate until the time of her death, since under no possible conditions could she have any interest whatever in the remainder of the estate. It was claimed that under the circumstances the doctrine of the acceleration of remainders would apply, and that the distribution should be accelerated upon the determination of the prior life estate; that Mrs. Newberry, while not physically dead, was legally dead so far as the remainders were concerned.

The suit was tried, first in the local court, with an imposing array of counsel upon each side and was decided by Judge Williams in favor of the acceleration as claimed by Mr. Dexter for the other heirs.

An appeal was taken to the Supreme Court, and the judgment of the court below was reversed, four of the seven judges of the Supreme Court favoring such reversal, and three of the judges dissenting. This judgment was entered in the January term, 1878. A petition for a re-hearing was granted, and the cause was reargued in the January term, 1880. Upon full consideration the court again adjudged that the decree of the court below be reversed, and judgment was so entered February second, 1880. In this case, as before, four of the judges favored the

reversal and three dissented. After the ending of the June term, 1880, and in vacation four of the seven judges, of their own motion, ordered a reargument, the order, setting aside the judgment of the January term, 1880, and such order being signed by the three judges formerly dissenting from the judgment of the court, and one of the four favoring it. This action was taken by all parties as an indication that the majority of the judges would decide in favor of the acceleration of the remainders. An argument was had, however, before the Supreme Court, as to whether the court had the authority, under these circumstances, to order a reargument, and the court itself finally decided that it had no such authority, and the decision as made was left as the decision of the court.² The court itself decided that under the statute relative to rearguments before the court, after a term of court had intervened, it had no authority except by statute, and the statute only gave such authority when the judgment had been wrongly entered, and thus did not correctly show the decision of the court. As a further ground, the court held that it would be an unwise precedent to order a rehearing because of the changed attitude of one of the judges; that public policy and the stability of legal proceedings demanded that such judgment should not, after a term of the court had intervened, be disturbed because one of the judges had changed his views of the law.

² 100 Illinois Reports, 484.

pany, for property or money lost or stolen from passengers while riding in the Pullman cars. The grounds upon which these actions were brought were two: First, it was claimed that the liability of the Pullman Company was that of an inn-keeper, liable for property stolen from guests at the hotel; or, in case it were decided that the liability of the company was not that of an inn-keeper, it would *then be* liable as a common carrier. In defending one of these suits, the decision of which has since been a leading case in the affairs of the Pullman Company,⁵ Mr. Dexter took the position that the company was not liable as an inn-keeper, because it was not *open* to the general public, that it received pay in advance, of lodgers, merely for sleeping accommodations afforded by their cars, and only for a particular class, and for a particular trip, and for a particular berth; Second, that the company was not liable as a *common* carrier, because the company received no pay for transportation, the railroad company receiving all the pay for transportation, and under an arrangement with the Pullman Company, hauling its cars. The Supreme Court affirmed the correctness of each of these defenses and this decision has since been the law in the business of the Pullman Company.

Another case of great importance defended by Mr. Dexter for the Northwestern University turned upon the authority of the Legislature to exempt from taxation certain classes of property. In the Constitution

⁵ The Pullman Company vs. Smith, 73 Illinois Reports, 360.

of the State of Illinois adopted in 1848, occurs the following provision:

The property of the State and Counties, both real and personal, and such other property as the General Assembly may deem necessary for school, religious, or charitable purposes may be exempted from taxation.

In 1855, while such Constitution was in force, the Legislature passed an Act amending somewhat the original charter granted in 1851 to the Northwestern University. This Amendment contained the following paragraph:

All property, of whatever kind or description, belonging to or owned by such corporation shall be forever free from taxation for any and all purposes.

Under this charter the corporation expended in buildings, apparatus, and other appliances for education over \$200,000 realized from donations and the sale of lots, and had built up a university with several departments in which more than 500 students were taught the higher branches of learning. In 1870, a new constitution for the state was adopted in which was embraced the following provision:

The property of the State, Counties and other municipal corporations, both real and personal, and such other property as may be used exclusively for agricultural or horticultural societies for school, religious, cemetery, or charitable purposes may be exempted from taxation, but such exemption shall be only by general law.

In 1872, a statute was enacted conforming the law of the state to the provision of the new Constitution,

and ablest work in cases where the surroundings are such that the decisions are against him. Mr. Dexter's term of service with the railroad company embraced the period when what was known as the "Granger Legislation" swept over all that part of the country which is usually designated as the "Middle West." Public sentiment was such that the railroads were uniformly unsuccessful in their litigation upon a certain class of very important questions. One of the early suits of this class was based upon the attempt to tax what might be called intangible assets. To illustrate, take a case where the railroad has a bonded debt of \$1,000,000, and had issued stock to the amount of \$1,000,000, so that the market value of the bonds and stock would be \$2,000,000. At the same time, the State Bureau of Assessment, which aimed to fix the exact value of the tangible property of the railroad, that is to say, its right of way, its station houses, rolling stock, and appurtenances for conducting its business, assessed this tangible property at the sum of \$1,500,000. Here, then, was a half-million dollars between the market value of the property and its assessed valuation, which was not apparently represented by anything tangible or visible.

This vague asset the state proposed to tax. The railroads fought this tax upon various grounds, one of which was that the Constitution required that taxation should be uniform upon all property of the same class. A case of this character, in which Mr. Dexter was counsel, was decided against the railroad

company in the state courts. The decision was confirmed by the United States Supreme Court.⁶ The court held that the law might lack uniformity, therefore the method of assessment was perhaps as nearly equitable as any that could be devised, although not ideal.

In nearly every railroad which was chartered in the Middle West was a provision that the directors should have power to establish such rates of toll for the conveyance of persons or property upon their railroad lines as they should, from time to time, by their by-laws determine, and to levy and collect the same for the use of the corporation. The natural meaning of this authority would seem to give to the directors absolute control over such rates of toll. Laws were, however, passed in nearly every state fixing the rates of toll at a rate below that fixed by the by-laws of the corporation, and the right thus to legislate was denied by the corporation. Many suits in the different states were brought to test this question, the principal claim of the railroads being that their charters were contracts, and that no state had a right to pass a law impairing the obligations of contracts. The principal cases were appealed to the United States Supreme Court.

The state courts and the Supreme Court of the United States ultimately decided all these cases against the railroads, and in doing this held that the laws referred to did not impair the obligation of con-

⁶ 92 United States Reports, 575.

tracts; that the authority granted to fix rates meant that the directors should have the right to fix reasonable rates for the transportation of persons and property, and that the courts had the right to determine whether the rates were reasonable or otherwise. This course of litigation and decisions occupied many years, and the law must now be considered as settled in accordance with such decisions, although to the writer it is not easy to see how such decisions are in accord with the famous Dartmouth college case. The substance of the decision is, that grants of immunity from government control are never to be presumed, but on the contrary, the presumptions are all the other way, and unless the presumption is clearly established the Legislature is free to act on all subjects within its general jurisdiction as the public interest may require.

While Mr. Dexter's pride, delight and ambition were in his chosen profession, and while to this he devoted largely his intellectual energies yet to those who knew him any sketch of his life would seem singularly incomplete without reference to his magical social endowment, and his powers outside his chosen field of labor. He had a quick and abounding sympathy with nature. He was fond of country exercise and all manly sports. The majestic grandeur of the mountains, and the flower-sprinkled tresses of the meadow, alike were his joy and inspiration. His standing in the community was singular and almost unique, owing to the universal belief that he was a

man of special moral, as well as intellectual force. His absolute integrity was never questioned. He was a much-trusted man. His influence was the more wide-spread because of his independence of political organizations. In early life he appreciated the evils of slavery and was vigorous in its denunciation; during the Civil War he upheld eloquently and at all times the efforts of the government to do battle with those who sought the destruction of the Nation's life, and with it the chiefest hopes of humanity; yet when a military officer suppressed the publication of the *Chicago Times*, for alleged treasonable utterances, and a mass-meeting of citizens was called to consider the matter, his voice was first and most effective in denouncing the arbitrary act fettering free speech and free discussion in the territory remote from the conflict of arms. He always acted in national affairs with the Republican party, until the nomination of Mr. Blaine for president. In local and municipal matters, he never considered for a moment the politics of a candidate, but always aimed to support the man best-fitted for the office.

He had a life-long admiration for good talkers, and his friendships were broad, while discriminating. His father was a boyhood friend of Wendell Phillips, and the house of Mr. Dexter, was for twenty years the Chicago home of this graceful and brilliant orator. James Russell Lowell, Ralph Waldo Emerson, Theodore Parker, Charles Dudley Warner, Judge David Davis, Henry Irving, and a host of men emi-

nent and honored in every walk of life, also regarded Mr. Dexter's house as their natural stopping place when in the city.

His married life was satisfying and beautiful. His home was for him a Paradise and was the center of Chicago's social and intellectual life. At a time when it is thought that conversation is a lost art, Wirt Dexter was so excellent in talk that we easily conceive he would have been welcome in any circle in a period when conversation was most cultivated. He had the equipment for conversation. He had wit and imagination. His mind was stored with literature and knowledge of the world. He had the discipline of an important professional, and an important business career. He had an interesting and almost phenomenal verbal memory, with the rare faculty of quoting other men's ideas without hindering the abundance of his own. He had quick and almost tumultuous thought, which was always subdued to perfect clearness and precision by a masterful faculty in expression. He had a rich vocabulary, and the diction which even in the quiet of conversation always suggested eloquence.

This suggestion of eloquence in Wirt Dexter's conversation became actual eloquence, brilliant and powerful, in his public speech. He was an orator, and an orator of a high class. His professional oratory was exceedingly effective, but his gifts were even more fitted for public life and its greater and broader questions. His friends often regretted that he did

not continue in the public career he began when a very young man, and when the question of slavery roused him to public action and public speech. They regretted, too, that he did not answer more readily to the urgent wish of the community that he should appear more frequently upon important public occasions in Chicago. No man was more wished for, and none received quieter audience. The reason that he, who seemed so naturally allied to public life and who had so easily the ear of the people, so rarely appeared in public was that he was not sufficiently moved by the less inspiring public controversies of his later years, so long as his profession and his books and his friends gave to him a life that exercised satisfactorily his intellectual powers.

To the circle of his chosen friends, great as was their admiration for his intellectual endowment, it was his heart that was esteemed by them greatest. Love of quiet friendship was the most remarkable quality of this man, who seemed born for the combats of the forum and the storm of a public career. This personation of aggressive intellect, to his intimate friends, was the tenderest and gentlest of men. His death was wholly unexpected. Of a strong, vigorous and majestic manhood, up to the last he had seemed the impersonation of abounding physical and mental vitality. In an hour, on one of the best and happiest days of his splendid career,—in its seemingly supremest hour,—he had joined the silent and innumerable host.

JAMES BRADLEY THAYER.

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1831-1902.

BY

JAMES PARKER HALL,

Dean of the University of Chicago Law School.

OUR country, in which the legal profession has always been much respected and honored, has produced many eminent lawyers, and not a few judges of high excellence, but the roll of its legal scholars is as yet extremely short. Indeed, much of the necessary material for legal scholarship, in the modern sense, has only recently become accessible, and its recovery from manuscript and publication is still progressing all too slowly in England. Among the foremost, however, of the little pioneer band of scholarly American investigators of English law will be remembered James Bradley Thayer, who for nearly a generation occupied first the Royall and then the Weld professorships of law in the Harvard Law School.

Mr. Thayer was born January 15th, 1831, in Haverhill, Essex county, Massachusetts, the second son of Abijah Wyman and Susan Bradley Thayer. His elder brother, William Sydney Thayer, became an editorial writer and Washington correspondent of

some distinction for the *New York Evening Post*, was appointed consul-general to Egypt in 1861, and died there in 1864. There were two sisters, and on the father's side the family traced descent from John Alden. Abijah Thayer was the editor of a Whig paper, the *Hampton Gazette*, in which, it is said, were published Whittier's earliest poems. The lot of the country editor in the 1830's was a precarious one, and the paper's financial prospects were so injured by its advocacy of the unpopular temperance cause that in 1835 Thayer gave it up and moved with his family to Philadelphia. Here he went into business, but, after several unsuccessful ventures, he returned five years later to Massachusetts and attempted the culture of silkworms, a novelty at this time attracting much interest in the eastern part of the United States. With many others he was disappointed in the outcome of this effort, and, moving to Northampton, he again engaged in editorial work, on the *Hampshire Herald*. Finally this was abandoned and he became a broker, in which business he continued until his death in 1864.

The boy James, with his brother, attended school in Northampton until 1845, earning his board by doing "chores." He set type in a printing office for a short time, and worked for eight months in a physician's office. In 1846, as he relates in a humorous account of his early life written in college later, he "experienced religion and became a Baptist." He admits that he was "more of a Baptist than a Chris-

tian," and that "baptism by aspersion" was his chief dogma, but his purposes were so much affected that he thought seriously of becoming a western missionary. Fortunately, perhaps, about this time the young convert fell sick, and, a Unitarian tract coming into his hands during his illness, he became a believer in the religious views of that society, to which he ever afterwards strongly adhered and of which he became one of the most active and distinguished lay members. He records that his missionary zeal burned as strongly for the new faith as it had for its late predecessor, but that he was disappointed to find no one anxious to assist him on the path of a Unitarian colporteur.

In 1847 young Thayer began definitely to prepare himself for college while working as a clerk in a grocery store. He was much encouraged in this by a rare woman, Mrs. Joseph Lyman, whose memory is still held in affectionate remembrance in Northampton for her many wise and kindly deeds and the never-failing interest and helpfulness she displayed toward young people. Preparing for college sixty years ago was not so long a road to travel as it is to-day, and by the fall of 1848 Thayer was ready to enter Harvard. With him to Cambridge came his Northampton friend and schoolmate, Chauncey Wright, whose early promise, fitful brilliancy, and melancholy end make a story of such sad interest. He, too, probably owed his opportunity to attend college to the good services of Mrs. Lyman; and it

Law School, having, as he says, "made up my mind after infinite distraction to study law rather than divinity, toward which I had had a strong inclination." During the first year here, he roomed with Chauncey Wright, an arrangement much to the liking of both. Thayer taught privately during much of the time to defray his expenses, but in spite of this drain on his time he was recognized as one of the strongest men in the school, and on his graduation in 1856, he received the first prize for an essay on *The Law of Eminent Domain*, published in the *Boston Law Reporter* of that year. It was a noteworthy coincidence that his earliest published legal writing should have concerned a subject in which later he became so distinguished an authority.

In December, 1856, the young lawyer was admitted to the Suffolk Bar, and almost immediately he formed a partnership with William J. Hubbard, then one of the masters in chancery of Suffolk County. This association continued until Hubbard's death in 1864. Thayer succeeded him as master in chancery, a position which he held until his resignation in 1874; and in 1865 he became a law partner of Peleg W. Chandler and George O. Shattuck. Shattuck withdrew in 1870, and John E. Hudson, a man of great power and ability, who afterwards became president of the American Bell Telephone Company, was taken into the firm as junior member. The partnership thus formed continued until Thayer withdrew from practice.

One of the most important pieces of litigation with which he was connected was that arising out of proceedings of the Marginal Freight Railway Company in Boston in the early 70's. The scandalous transactions of this public service company were investigated by a committee for which Mr. Thayer was counsel, and the committee's report to the Legislature, arraigning the conduct of the company's affairs in the most vigorous language, was drawn by him. As a result the charter of the company was repealed in 1872. While in practice Mr. Thayer was a contributor to Bouvier's Law Dictionary and to the American Law Review, and in 1870 he was chosen editor of the twelfth edition of Kent's Commentaries. In this work he associated with him Mr. O. W. Holmes, Jr. (now Mr. Justice Holmes of the United States Supreme Court), and the volumes eventually appeared in the name of the latter, Mr. Thayer's part in them being limited to that of revision. Though respected and successful in practice, Mr. Thayer was perhaps not enough of a partisan ever to take the highest rank as a lawyer. He was perhaps too judicially-minded, and saw the merits of opposing views too clearly for this. Of the advocacy of his former partner, Shattuck, he said, after the death of the latter, in one of those personal tributes of which he was so graceful a master:

Never did client have a more devoted counsel. His associates sometimes wondered to see him so warm in the cause, disturbed so much at the capacity of the adversary to hold out against the

truth, and settling into such dark suspicions against the opposite client. But this warmth of feeling and deep interest in the cause which he had espoused was a great source of power.

Probably the speaker could not have felt the same intensity of conviction in some of the cases that to his partner were so clear. This temperament may have been less suitable for an advocate, but it won him to the work in which he was to achieve a fame more enduring than if he had been a great lawyer. In 1874 he was offered the Royall professorship of law in the Harvard Law School, and, after much deliberation on account of the pecuniary sacrifice involved, he accepted it as a congenial promotion in his profession.

At the age of forty-three, after eighteen years of experience at the bar, Professor Thayer began the great work of his life, the study and teaching of English law. He came to the law school in Cambridge at the beginning of an era. Of the eminent teachers of the generation then closing, Joel Parker and Theophilus Parsons had just gone, and Emory Washburn was soon to follow. Professor Langdell had been made Dean and had introduced the case method of study. James Barr Ames had joined the law faculty shortly before Professor Thayer, and John Chipman Gray became Story professor of law a year later. The Harvard Law School, as the present generation knows it, had its birth, and it was the mutual good fortune of Thayer and the school that he was one of the four men who laid deep the found-

datations of its success. At the time he took up the teacher's profession he had perhaps never become wholly absorbed in the practice of law. The large amount of literary criticism from his pen between 1862 and his coming to the law school in 1874 indicates the breadth of his other interests. But, once launched in the new career, its problems and duties speedily absorbed his most earnest attention. The graceful literary essays ceased, and in their place began that series of contributions to the theory and history of the law which earned for him so high a place in the opinions of both legal scholars and practical jurists. Though he taught some other subjects also during his years in the law school at Harvard, it is upon his work in evidence and constitutional law that Professor Thayer's reputation as a legal scholar and thinker will always rest, and no account of his life would be complete that did not clearly point out the character of his achievements in these fields.

It is not too much to say that the subject of evidence has been for a century the most disordered, ill-defined, and little understood topic in the whole range of the common law. Many things have contributed to this. The circumstances of the origin of many of its rules, their early development—chiefly at *nisi prius*, the later attempts to rationalize them without an adequate comprehension of their history and purpose, their increasing technicality and rigor, the misleading nomenclature used, and the utter fail-

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Early in his teaching career, Professor Thayer formed the intention of writing a practical treatise on the law of evidence. As soon as he began to collect material for this, and, like Sir Henry Maine, "let his intelligence play freely over the subject," his clear and highly-trained mind was struck by the existence of confusion and difficulties not at all met by the conventional abracadabra of fiction and reasoning to be found in the books. To use his own words:

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The results of this investigation, extending over many years, are embodied in Professor Thayer's most important single work, the *Preliminary Treatise on Evidence at the Common Law*, which was published in 1898, and contained, in large part, matter that had appeared in the form of essays in the *Harvard Law Review* between 1889 and 1893.

Just before Thayer entered the law school, Dr. Heinrich Brunner of Berlin had published his famous work on the *Origin of the Jury*, which recorded the institution's early history on the continent but did not attempt to follow its development in England after it secured firm foothold there during the reign of Henry II. The unfolding of this later story Professor Thayer believed would explain much that seemed crude and unintelligible in the modern law of evidence, and with this purpose he diligently undertook the task of exploring the early English chronicles, judicial records, and legal writings. Never was hypothesis more brilliantly vindicated, or historical research more abundantly rewarded. He was not, of course, the first person to discover that the law of

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evidence was the product of the jury system. That was patent upon very slight consideration. But he was the first definitely to show by the written records of English law just how and when the successive steps in the development of trial by jury were taken; how from being a somewhat arbitrary method of proof it gradually evolved into a rational method of trial; and how out of the practical administration of the latter grew and crystallized our rules of evidence.

The Dukes of Normandy, in matters of fiscal administration, employed a procedure called the *inquisition*, inherited from the older Frankish law of the territory they had conquered. Questions relating to the royal revenue were answered under oath by members of the community selected for their knowledge of the facts at issue. As the sovereign was judge as well as tax-gatherer, he sometimes exercised the privilege of requiring this procedure in administering justice between his subjects. When the Normans conquered England the *inquisition* was at once introduced there, habitually in fiscal matters, and occasionally in civil cases by favor of the crown. Henry II, in the last half of the twelfth century, greatly extended this latter use of the *inquisition*, now known as the *recognition* or *assize*, and made it available to litigants in certain cases as a right instead of as a favor. The selling of *recognitions* by the crown was forbidden by *Magna Charta*; the new writs issued thereafter, especially those authorized by the Statute of Westminster, all required

the jury; and its rapid triumph was hastened by the collapse in the same century of the older modes of trial by ordeal and the duel, and the steadily waning use of the wager of law. Before 1300, the jury was in common use in England in all kinds of actions—other modes of trial were the exception. Up to this point Brunner had carried his work, and it is Professor Thayer's chief authority regarding Norman practices, though he worked out more fully from English records the history of the introduction of the jury into England, and the steps by which it displaced the older modes of trials.

The jury at the beginning of the fourteenth century, just after it had won so predominant a place in English law, was a far different institution from that of which Blackstone wrote or with which we are familiar to-day. As the historian of that development which transformed it into a rational instrument of modern justice, Professor Thayer was a pioneer. The original conception of the jury was of a body of men already informed about the fact at issue—indeed, chosen because possessing this information, and who declared the fact chiefly, or perhaps wholly, from their own knowledge. They were witnesses and triers in one. Where special knowledge was necessary, those who had such knowledge were summoned. Witnesses to deeds might be combined with the jury and at first were treated as constituent parts of it; later the jury proper alone decided the fact. Unsworn statements of counsel went to the jury as

in the heat and pressure of trials at *nisi prius*. In the result, as Professor Thayer says:¹

Our law of evidence is a piece of illogical, but by no means irrational, patchwork; not at all to be admired, nor easily to be found intelligible, except as a product of the jury system, as the outcome of a quantity of rulings by sagacious lawyers, while settling practical questions, in presiding over courts where ordinary, untrained citizens are acting as judges of fact. Largely irrational in any other aspect, in this point of view it is full of good sense—a good sense, indeed, that occasionally nods, that submits too often to a mistaken application of its precedents, that is often short-sighted and ill-instructed, and that needs to be taken in hand by the jurist, and illuminated, simplified, and invigorated by a reference to general principles.

This is the outline of the history of trial by jury in England which is told in the first part of the *Preliminary Treatise on Evidence*. The development of the institution, step by step through century after century, is traced with a wealth of historical knowledge, a fullness of illustration and reference, and a minuteness of scholarship, that compel in the reader a full measure alike of admiration and conviction. The judicial records and writers before the eighteenth century have been so thoroughly read and so skilfully used that the author's conjecture is seldom necessary to bridge a gap or resolve a doubt—the evidence speaks for itself.

The second part of the work is analytical, comprising a searching examination into the true character of the law of evidence, a keen discrimination

¹ *Preliminary Treatise on Evidence*, p. 509.

of it from a variety of matters with which it is ordinarily confused, and a critical study of several topics connected with judicial administration. The central thesis is that the law of evidence performs its characteristic function in excluding from the jury evidential matter, which, though logically probative, must for practical reasons be kept from their consideration. This conception, acutely and consistently applied by him to the chief sources of confusion, is Professor Thayer's great contribution to the theory of the subject.²

There are many reasons for excluding what is offered in evidence that have no relation at all to the law of evidence. If a thing be excluded because it is not within the scope of the general issue, it is excluded by the law of pleading; if, under the substantive law of the case, what is offered has nothing to do with the question, then it is the substantive law of the case that excludes; if what is offered has no logical relation to the case, then it is the rule of reason that rejects it; or a party may be estopped from setting up what he offers evidence to prove. But when matter of fact bearing on the issue is excluded for none of these reasons, yet lawfully, it is the law of evidence that is working.

All this is seen to be logical, sound, almost obvious, perhaps, though other writers upon the topic had failed to grasp it; and it has clarified the subject to an extraordinary degree. Most of the rulings in our courts that evidence is or is not admissible, classify themselves elsewhere than under the law of evidence. This is even true of most of a large class that at first sight seem properly to belong there—

² Preliminary Treatise on Evidence, p. 515.

national habits, but also of the fact that human experience is incommunicable when men and nations are not prepared to learn from it. Civilization is not a matter of particular centuries,—the later ones; but of a particular stage of human development. . . . And again, if the reader, in running over these chapters, has wondered that the movement was so slow, that men should lie enslaved to forms and habits so long after the meaning had left them, that they should fail to make some obvious, slightly new application of principles already grasped, and should wait for centuries before this is done, we may reflect that this same thing appears all through human history. Perhaps it will be otherwise as the superior and elect minds of our race come to find an audience among the men of their own day—a thing more and more happening as swift means of communication make all men neighbors. But, meantime, we are helped to understand this fumbling and wandering of the human mind . . . by noticing what has happened elsewhere. . . . This bit of human history, then, which we have been studying, is simply of a piece with all the rest.

This glimpse of the sane political philosopher gives added weight to Professor Thayer's closing conjectures as to the future of the law of evidence, which he thinks may be most wisely improved and simplified by judges who shall be authorized by law to make general rules upon the subject. For this, the present English method of regulating practice by orders of court would be a precedent.

For the use of his classes Professor Thayer prepared, in 1892, his *Cases on Evidence*, which, with many illuminating extracts from the editor's essays upon the subject already published, traced the development of the principal rules of exclusion, and set in their proper place those related matters of

judicial administration and substantive law with which they are often confused. A new edition appeared in 1900, containing some changes approved by the test of use; and probably this has proven itself the most successful case-book ever published.

The other subject in which Professor Thayer became a widely-recognized authority was constitutional law. From his student days in the law school this topic had attracted his interest. Mention has already been made of his graduating prize essay on *The Law of Eminent Domain*, in 1856, printed in Volume 19 of the *Boston Law Reporter*. This contained a very thorough examination of the existing authorities, and, though occasionally attributing to the "law of nature" a somewhat larger operation than would have satisfied its author in later years, it was by far the best exposition of the American law upon the subject that had yet been published. In this essay appears, carefully elaborated, the doctrine afterward adopted by the United States Supreme Court, denying the power of a Legislature to make an irrepealable contract limiting its exercise of vital governmental functions.⁴

An opinion which Professor Thayer early formed and always vigorously maintained was that great freedom should be given the Legislature in adopting and pursuing its chosen policies. In 1859 we find him writing, *apropos* of the new Kansas Constitution:

⁴ *Law Reporter*, pp. 241-262; 301-325.

The simplicity of the great general objects of a written constitution is obscured and marred by inserting therein restrictions upon the powers of legislation, where the restrictions relate to details, or to subjects which are not yet fully understood.

It is a misuse of our constitution to insert in it this provision that "The manufacture and sale of intoxicating liquors as a beverage are prohibited." Are the wisest and best men agreed upon the wisdom or policy of that? Is it not notorious that they differ? . . . Anything of that sort is in no shape to incorporate in the constitution. . . . Our state constitutions . . . were made to be the guaranty and charter of a few simple, well-established, uncontroverted principles—lest in moments of passion or inadvertence, or under the temporary pressure of special interests, these should be disregarded. They were not made to be codes of laws, or to embody the opinion of a momentary majority upon an entirely unsettled question like this of the best way to deal with the drink question. That other states have forgotten the true conception and purpose of a constitution, and have inserted this and other like provisions of detailed legislation is no reason why we should follow them. The process of using constitutions in this way is a process of degradation from the example of our fathers.

And again, after he had been a teacher of law for twenty years:

The checking and cutting down of legislative power, by numerous detailed prohibitions in the constitution, cannot be accomplished without making the government petty and incompetent. This process has already been carried much too far in some of our states. Under no system can the power of the courts go far to save a people from ruin; our chief protection lies elsewhere. If this be true, it is of the greatest public importance to put the matter in its true light.

In the same spirit he always insisted upon the

wisdom and necessity of judicially upholding all legislation concerning the constitutionality of which there might be reasonable disagreement. In a time like our own, when change and conflict in social and economic theory are so promptly reflected in the statute-book, too serious attention cannot be given to the nature and extent of the judicial power to control legislation. Professor Thayer's views are forcibly expressed in one of his best-known addresses upon the subjects:⁵

Having regard to the great, complex, ever-unfolding exigencies of government, much which will seem unconstitutional to one man or body of men, may reasonably not seem so to another; that the constitution often admits of different interpretations; that there is often a range of choice and judgment; that in such cases the constitution does not impose upon the legislature any one specific opinion, but leaves open this range of choice; and that whatever choice is rational is constitutional. . . .

The legislature in determining what shall be done, what it is reasonable to do, does not divide its duty with the judges, nor must it conform to their conception of what is prudent or reasonable legislation. The judicial function is merely that of fixing the outside border of reasonable legislative action. . . .

The ground on which courts lay down this test of a reasonable doubt for juries in criminal cases, is the great gravity of affecting a man with crime. The reason that they lay it down for themselves in reviewing the civil verdict of a jury is a different one, namely, because they are revising the work of another department charged with a duty of its own,—having themselves no right to undertake *that* duty, no right at all in the matter except to hold the other department within the limit of a reasonable interpretation

⁵The Origin and Scope of the American Doctrine of Constitutional Law, *Harvard Law Review*, vol. VII, 144-5.

and exercise of its powers. The court must not, even negatively, undertake to pass upon the facts in jury cases. The reason that the same rule is laid down in regard to revising legislative acts is neither the one of these nor the other alone, but it is both. The courts are revising the work of a co-ordinate department, and must not, even negatively, undertake to legislate. And, again, they must not act unless the case is so very clear, because the consequences of setting aside legislation may be so serious. . . .

The rule under discussion has in it an implied recognition that the judicial duty now in question touches the region of political administration, and is qualified by the necessities and proprieties of administration. . . . It involves, owing to the subject-matter with which it deals, taking a part, a secondary part, in the political choice of government. If that be so, then the judges must apply methods and principles that befit their task. In such a work there can be no permanent or fitting *modus vivendi* between the different departments unless each is sure of the full co-operation of the others, so long as its own action conforms to any reasonable and fairly permissible view of its constitutional power. . . . [The courts] must not step into the shoes of the law-maker.

Though, as a political question, Professor Thayer wholly disapproved of our acquisition and retention of the island possessions of Spain in 1898, yet he did not permit his political beliefs to affect his conviction of the constitutionality of all that our government did in that behalf. While many distinguished New Englanders were indulging in the most depressed opinions of the decisions in the Insular Cases, he supported them upon the following fundamental ground:

Where our system intrusts a general subject to the Legislature, nothing but the plainest constitutional provisions of restraint, and

the plainest errors, will justify a court in disregarding the action of its co-ordinate legislative department—no political theories as to the nature of our system of government will suffice, no party predilections, no fears as to the consequences of legislative action. In dealing with such questions the judges are, indeed, not acting as statesmen, but their function necessarily requires that they take account of the purposes of statesmen and their duties; for their own question relates to what may be permissible to a statesman when he is required by the Constitution to act, and, in order that he may act, to interpret the Constitution for himself; it is never, in such cases, merely the dry question of what the judges themselves may think that the Constitution means.

Besides half a dozen carefully considered articles in the law journals, Professor Thayer's chief published work in constitutional law was his *Cases on Constitutional Law* in two large volumes, which not only brought together all of the great decisions that have developed and enforced the principal American doctrines of the subject, but also contained a valuable collection of historical material illustrating the growth of the political and governmental theories that early influenced our constitutions and with reference to which much in them must still be read. In this part of the work were considerable extracts from his widely-known address upon *The Origin and Scope of the American Doctrine of Constitutional Law*, delivered at Chicago in 1893, before the Congress on Jurisprudence and Law Reform, in which he suggests that our early adoption of the novel doctrine that courts may declare laws unconstitutional was much influenced by our colo-

nial experience, during which the English Privy Council on appeal declared colonial laws in violation of the charters to be void. It was his reputation as a sound and statesmanlike constitutional lawyer that moved President McKinley to offer Professor Thayer a place on the Philippine Commission in 1900—an honor which his health and engagements compelled him to decline; and it was not until after his death that it became known that his hand had drafted a large part of the constitutions of the two Dakotas.

It goes without saying that a man of Professor Thayer's exact scholarship and breadth of view left his mark upon legal education in America. In the professor's chair he was painstaking, candid, never dogmatic, yet firm in his own carefully-formed opinions. His success with his students was not that of the magnetic teacher whose very personality inspires enthusiasm in the work. It lay in the admiration and respect of many successive classes for his mastery of what he taught, for the power and accuracy of his thinking, and for the modesty and fineness of the man. Of his method as a teacher one of his most discriminating pupils has said:⁶

It was to the better men in his classes that Professor Thayer's teaching was chiefly addressed. His desire seemed rather to fathom the depths of the subject before him than by evading difficulties and exceptions to present the simpler outlines of the law in such fashion that the dull and the slow could comprehend them.

⁶ Prof. Samuel Williston, in *Harvard Law Review*, vol. XV, 608.

He was infinitely patient with the poorly-gifted, but he did not let the limits of their comprehension define the boundaries of the work in his courses. . . . He had little inclination to develop from his own mind a perfectly logical or entirely consistent body of legal doctrine. If the law as he found it was neither logical nor consistent, the effort of his teaching was to show exactly what the law was, and how it had grown up in this way rather than to work out a more systematic and logical theory than the courts had made. Accordingly, he aimed to bring out the precise legal significance of each case he dealt with. The exact question of law decided by the court was the fundamental thing to be considered, and to this end he was particular to have it carefully noted how the case had been carried to the higher court, and the nice shades of distinction depending on this. I have always thought his analysis of a case more exact and complete than that of anyone else I ever knew. He never found more in a case than actually was there, and nothing that was there escaped him.

And the concluding words of the same writer will find an echo in many hearts:

Few can have attended his lectures without learning more than the legal doctrines which were the direct objects of their study. Something at least of the accurate and careful habits of mind, the patience in wearisome investigation, the absolute intellectual sincerity, the never-failing kindness and courtesy, which distinguished the teacher, must have borne fruit in the minds and hearts of the pupils.

The influence he exerted upon the ideals and methods of the goodly number of graduates of the Harvard Law School now teaching law must, through their efforts, have multiplied itself in other generations of students many-fold.

It was not only as a teacher, but as an earnest

advocate of higher standards of legal education, that Professor Thayer influenced the teaching of law in this country. In 1895, as Chairman of the Section of Legal Education of the American Bar Association, he made an address upon *The Teaching of English Law at Universities* which called forth an extraordinary number of approving letters from judges, teachers and lawyers throughout the English-speaking world, among them the Lord Chancellor and the Lord Chief-Justice of England. In a public address shortly after, Lord Russell took substantially the same ground. The terse comment of one correspondent upon this address—that it was “good stuff in uncommon good English”—aptly characterized most of Professor Thayer’s writing. It was an unanswerable plea for the study and teaching of law “as other great sciences are studied and taught in the universities, as deeply, by like methods, and with as thorough a concentration and life-long devotion of all the powers of a learned and studious faculty,” using generous libraries and supported by adequate endowments. In 1900 Professor Thayer took an active part in forming the Association of American Law Schools, organized to promote higher standards of legal education, and by common consent was chosen its first president. He was also an appreciative member of the Selden Society, and did what he could to extend in America an interest in its work.

During the years of Mr. Thayer’s practice he kept

up a keen interest in the world of letters. He was a frequent and valued contributor to the *New York Evening Post* and the *Boston Daily Advertiser* upon a wide range of literary topics, and less frequently he wrote for the *North American Review*, the *Atlantic*, and the *Christian Register*. Nearly all of the great translations and the noteworthy poetry that appeared on either side of the ocean between 1860 and 1875 were reviewed by him, in one or the other of these publications, with a breadth of literary culture, a delicacy of appreciation, and a sane discrimination, that would have been remarkable in a professional critic of letters. So strongly were the college authorities at Cambridge impressed with his ability in this field that in 1872 he was offered a professorship of English in Harvard College, which he declined without much hesitation—a decision certainly fortunate for the law, and probably equally happy for him.

Among the literary tastes of Mr. Thayer most striking to one of the present non-classical generation was his fondness for Greek. On the first page of his collection of *Cases on Constitutional Law* is a quotation from Aristotle's *Politics*, a source that some would no doubt regard curiously unpromising for light upon a subject so modern and indigenous as American constitutional law. Its insertion was no pedantic flourish, for the editor had a lifelong familiarity with Greek thought and literature. His critical reviews of Lord Derby's and Bryant's trans-

lations of the Iliad, of Bryant's Odyssey, and of Tennyson's fragments from Homer, and his comparisons of these with each other and with the translations of Pope and Cowper not only evince his acquaintance with the letter and the spirit of Greek poetry, but are full of interest to the non-Hellenist. In a few places he pointed out minor inaccuracies in translation which were later corrected by Mr. Bryant, upon whose work as a whole Mr. Thayer passed a most favorable verdict. Other notable Greek translations reviewed at length by Mr. Thayer were Jowett's Plato and Cranch's Electra. An interesting theory which he held with tenacity and expressed on many occasions was that a rendering of the Iliad into English hexameters would not only be the ideal translation, but was a perfectly practicable feat; a view in which he remained little shaken by Mr. Bryant's exposition of its difficulties. It is not surprising that, when called to the law school, some of his friends should have thought he would make as good a Greek professor as a professor of law. He also reviewed translations of Lucretius by Johnson, of the Æneid by Cranch, of Plutarch's Morals by Goodwin, of Dante's Purgatorio by Parsons, of Faust by Bayard Taylor, and of Lessing's Laocoon by Miss Frothingham, a linguistic achievement which it may be doubted could be paralleled by any active member of the bar to-day.

Among the more noteworthy works in English which passed beneath his pen were Whittier's Snow-bound, and Tent on the Beach, Morris's Jason, Tho-

reau's Letters, and a considerable number of poems by Arnold, Tennyson, Swinburne, Emerson, Lowell, and Mrs. Howe. Mill's Utilitarianism was discussed in a long article in the *North American Review*, in which some of Mill's assumptions were keenly criticised. Mr. Thayer also made a modest contribution to Shakesperean literature in an analysis of Hamlet's treatment of Ophelia.

After entering the Harvard Law School, Professor Thayer's energies were so largely devoted to legal research and teaching that he found little time for continuing these literary diversions. What leisure he could spare for serious writing outside of the field of his profession he chose to devote chiefly to the offices of friendship rather than to the delights of literature. In 1878 he published privately the *Letters of Chauncey Wright*, containing not only many extracts from the correspondence of this classmate and dear friend, but a sympathetic sketch of Wright's life. The material for this work was collected with infinite toil and patience, requiring, as it did, a wide correspondence with Wright's friends and acquaintances, and it was treated by Professor Thayer with great delicacy and faithfulness. The story of Wright's boyhood days gives an interesting picture of the life of two generations ago in the community where Thayer spent the latter part of his own youth. In 1884 appeared another labor of love, *A Western Journey with Mr. Emerson*, in which is recounted with close fidelity and with great charm of style the

experiences, impressions, and observations of the sage of Concord during a trip taken by him to California in 1871 with a small party of friends which included Mr. Thayer. The adventures of the party and Mr. Emerson's share in them are related simply and delightfully. One of the most interesting incidents described is the meeting between Emerson and John Muir in the Yosemite Valley, and the quick sympathy that sprang up between the philosopher and the young Scotch millhand and naturalist. In 1897, in obedience to the dying wish of Judge E. R. Hoar, Professor Thayer prepared for the Social Circle of Concord a short biography of the Reverend Samuel Ripley, whose youngest daughter he had married. Ripley, who was a half-uncle of Emerson, was born in the "Old Manse" at Concord, and, after a busy life as preacher and teacher, he had moved back into the house of his birthplace before his death in 1847. This sketch, afterward expanded by the addition of Mr. Ripley's letters, naturally and effectively woven into the narrative, was privately printed.

One of Professor Thayer's happiest gifts was the rare touch with which he could so fitly characterize the lives of those friends whom death had claimed. In his riper years, seldom did one of these pass forever out of his circle of intimates that Thayer was not called upon to say the tender and fitting word of regard and estimation. With such unfailing grace and fidelity did he perform this task, that, when on his own death, a friend was asked to speak about him,

the first thought that rose in the mind of him addressed was: "Why Thayer would be the man for that." His classmates, Major Willard and Darwin E. Ware; his former law partners, Peleg W. Chandler, George O. Shattuck, and John E. Hudson; his family connections, Mrs. Samuel Ripley, Ezra Ripley, and George P. Bradford; and his friends, Benjamin Apthorp Gould, William H. Forbes, and Charles F. Dunbar were among those thus commemorated by him in brief addresses or sketches. He took the greatest pains in these tributes to secure breadth and accuracy, writing to intimate friends for their views and exercising much care in verifying small details. Of one of these memoirs one competent to judge wrote Professor Thayer: "I enjoy always what you write, for you catch the characteristics and mark them with such fine distinctness and moderation, as well as feeling. Your words bring him up just as he was when I first knew him on the classroom benches, and then in the faculty room while we both were teaching, and then at the bar and in the office." In these memorials he did not think it needful to omit all reference to well-known failings of those of whom he spoke, and, sometimes to the dismay of zealous friends, he uttered the truth as he saw it, tenderly but faithfully, about shortcomings as well as virtues. As he once very simply said, respecting a friend who had not quite realized some of the high promises of his early years: "I do not mention [these things] from any love of criticism, but because I

would worthily appreciate him, and would speak fitly and truly, and as he himself would wish, of one whom I have loved and admired ever since I knew him."

Professor Thayer's last published work was a short life of John Marshall, written in 1901, for the centennial of the great Chief-Justice's accession to the Supreme Court of the United States. In gathering and verifying material for this he made a trip to Virginia, and, upon February 4th, 1901, the anniversary of Marshall's taking the oath of office in Washington, he delivered an address in Sanders Theater, Cambridge, before the Harvard Law School and many invited guests, as a part of the exercises by which Massachusetts celebrated Marshall Day. The substance of this address comprises the principal part of the book. In the space of about 160 small pages the writer succeeds in giving a lively picture of Marshall as he was known to his family and intimates; a discriminating estimate of his judicial services, the more convincing that it does not omit the suggestion of a few criticisms; and, finally, some thoughtful reflections upon the nature of the judicial function of declaring laws unconstitutional, and of the effects upon a democracy of its frequent exercise. The quality and temper of the whole is so admirable that one cannot sufficiently regret that its author did not live to carry out his purpose of completing a detailed study of Marshall's life and writings.

Professor Thayer was a good citizen. Upon most

public questions of importance he not only held firm convictions, which upon proper occasion he expressed vigorously, but he gave freely of time and energy to the causes which he espoused. During the Civil War he was secretary of the executive committee of the New England Loyal Publication Society, which supplied materials for loyal editorials and newspaper articles to the country press throughout the North and West, 1,500 copies being sent out weekly at times. In 1886 he took a prominent part in the agitation for better methods of dealing with the tribal Indians, which resulted in the passage by Congress of the Dawes Bill in the following year. In furtherance of this, and to secure proper administration of the law after its passage, he wrote newspaper and magazine articles, and made several addresses which were widely circulated and discussed. He argued for tariff reform, and publicly protested against the improvident granting of valuable franchises by the municipalities of his state. Upon questions of local politics and policy he was a frequent contributor to the Boston and Cambridge papers, and the very readable comments which appeared over his signature sometimes disposed of his opponents with a vigor and completeness vastly entertaining. Broadly tolerant of honest differences of opinion, he had for loose thinking and disingenuous reasoning a scorn born of his own clear and candid mental processes, and in any controversy he was apt to deal with these faults severely. This characteristic appeared in his legal

writings as well as in these informal discussions in which he wrote as a free lance.

He was a man of strong religious faith. The reflections of early manhood, which had all but moved him to enter the ministry, and his later friendship and intercourse with Emerson, gave to his Unitarianism a vigor and enthusiasm not common among lay members. He accepted his share of responsibility and labor in the church, without question, as he accepted all other duties that came to him. In his later years, few indeed were the yearly Unitarian gatherings to which he was not called upon to contribute one of those short speeches, graceful, humorous, or earnest, that fell from him with such charm; and, in 1900, at the seventy-fifth anniversary of the founding of the American Unitarian Association he made one of the principal addresses, upon Emerson and Religion. He believed in his church and its freedom. In an address as President of the Unitarian Festival, he said:

I like to confess openly a full sympathy with those who, in adhering to the Christian Church and the Christian tradition, yet insist upon the freest possible movement of the human spirit in this department of thought and activity, as in all others. If, indeed, anyone finds himself hampered by the limitations which the term Christian imports, he will naturally leave the Christian Church, and God bless him! We do not find ourselves so hampered. If ever we do, we also will leave it. . . . Let us continue, in dealing with this precious and fragrant possession of our sacred literature . . . to deal with it not merely with reverent affection, but honestly, also, as those whose chief reverence and

affection are set on things behind the book. Let us continue to search it with criticism, to apply to it the full freshness of historical and literary sense, to save it from the vulgarizing influence of routine and tradition. And, if it be only a little that this book really tells us about any given matter (for example, about the life of Christ), let us not pretend that we know any more about it than we really do know.

His own attitude toward certain speculative difficulties is perhaps indicated by his words concerning a friend:

One might think . . . that she undervalued certain historical and traditional aspects of the question, or did not enough consider the necessary conditions of all public and institutional religion; that she was too unwilling to entertain some great and ennobling beliefs, merely as being dear to the human heart; that she lacked, perhaps, somewhat of the religious imagination.

The freedom he asserted for himself never declared its independence of human experience and human nature.

In his home and friendships, Professor Thayer was singularly blessed. In 1861 he married Sophia Bradford Ripley of Concord, and went to Milton to live, returning to Cambridge in 1874 upon his appointment to the law school. Before Austin Hall was built he occupied the old Holmes house, which stood near the present site of the law building; from there he moved to Phillips Place. His home was a rarely beautiful and happy one; its hospitality simple, gracious, and sincere. He lived to see his two sons, William and Ezra, well on the way toward distinction in their professions of medicine and law; one of his

daughters, Theodora, a successful artist; and the other, Mrs. John W. Ames, happily established in her own home. His friendships bore witness to the breadth of his interests, and to his own qualities of mind and character. Mrs. Thayer, who was a cousin of Ralph Waldo Emerson, was from a Concord family, and Professor Thayer was intimate with the choice spirits of both the Concord and the Cambridge circles of his time. His high-mindedness, his never-failing cordiality and helpfulness to others, his cheerful humor, the charm of his conversation, and the quiet distinction of his manner, drew friends close to him and endued with an unwonted grace all of the personal relations of life. Professor Thayer's description of his father-in-law, Samuel Ripley, has elsewhere been quoted by one of his friends as a true portrait of Thayer himself. It is worthy of repetition here.

What stands out in all the accounts of him which I have ever heard is the image of an affectionate, generous man, devoted to the duties of his calling, singularly disinterested, making no personal claims, unsparing in his acts of personal kindness and generosity; yet prudent in managing his affairs, firm in his moral principles and rigidly conforming to them in his own practice; *fond* of society, full of sympathy, and heartily enjoying the companionship of his friends; liberal-minded, of sound sense, a clear and quick intellect, and a hearty appreciation of what is best in literature and personal character.

In the widespread respect and recognition accorded to his scholarly labors, Professor Thayer was equally fortunate. On both sides of the Atlantic he

was regarded as one of the leading legal scholars of his time. The University of Iowa gave him the degree of Doctor of Laws in 1891, Harvard conferred upon him a similar honor in 1894, and Yale in 1901. After his death, resolutions or addresses commemorating his services and deploring his loss, were made a part of the proceedings of many learned and professional societies, such as the American Academy of Arts and Sciences, the Massachusetts Historical Society, the Colonial Society of Massachusetts, the American Bar Association, the Association of American Law Schools, and the Selden Society.

The end of this full, well-rounded life came suddenly. Professor Thayer had been warned of impending heart trouble, and in July, 1901, he wrote to one of his colleagues, "The head seems all right yet—so far as I can judge—but in other regions time is telling. Fast walking and mountain climbing are for others now." On Friday, February 14th, 1902, he was slightly ill and did not meet his classes at the law school. He sat down to dinner at home, and, at the close of the meal, he suddenly lost consciousness, and immediately expired from heart failure. He was buried from Appleton Chapel of Harvard University, and five hundred students of the law school, braving a driving storm of snow, accompanied the body from the house as a guard of honor. Among the papers in his study was found this touching memorandum, made by him just before the opening of the college year:

Sep. 15.

For next year.

Have a single plan to be put through. Without that the small, everyday matters eat up all the time. They easily may, for they can be done either well enough, or *perfectly*.

That plan must be the 2nd volume of Evidence.

For the year following, a small Vol. on Const. Law.

For the time following that, the works, writings, and life of Marshall—

and then an End.

WILLIAM MITCHELL.

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WILLIAM MITCHELL.

1832-1900.

BY

EDWIN AMES JAGGARD.

Associate-Justice of the Supreme Court of Minnesota.

WILLIAM MITCHELL was born on a farm at Stamford, Welland County, Ontario, near the Falls on the old Niagara Peninsula, November 18th, 1832. His father, John Mitchell, and his mother, Mary Henderson, were both born in Scotland. Having received a preliminary education at public schools in Canada, he matriculated as a sophomore at Jefferson College, now Washington and Jefferson College, at Cannonsburg, Pennsylvania, in the fall of 1850, shortly after the graduation of James G. Blaine. He thus came within Dr. Johnston's aphorism for the intellectual salvation of a Scotchman. According to Boswell, that epigrammatic dogmatist, in refusing to allow Scotland to derive any credit from Lord Mansfield, observed, "Much may be made of a Scotchman if he be caught young."

The simple and sturdy habits of life and thought initiated in his boyhood were there confirmed by his associations with a small number of boys—about 258

—substantially all of whom were of Scotch or of Scotch-Irish extraction, and of the Presbyterian religion. These students were conspicuous for strength, industry, earnestness and frugality.¹ His mental processes and acquirements and his personality were under the constant supervision of able and learned professors, not tutors. The members of the faculty, eight in number, and the college president, Doctor A. B. Brown, were of that middle zone of educators, now rapidly being depleted, which lies between the one pole at which teachers are sacrificed to the attainments of students, and the opposed pole at which the students are sacrificed to the personal progress of the man of research. The college facilities were limited. Its curriculum was narrow; its atmosphere surcharged with the Calvinism of the “unspeakable Scot;” but the mental drill was exacting and thorough; the moral discipline severe and exalting. Invertebrate logic was as effectively excluded as was molluscos morality. In his later years, Judge Mitchell dwelt with affection and gratitude upon this training and upon his daily intercourse with the faculty and with practically the whole body of his fellow students. He found in

¹ One of his classmates, William E. Hunt, D.D., Coshocton, Ohio, who is still living, describes Mitchell at College as a ruddy, smooth-faced, modest and friendly “Britisher;” a hard student, rather taciturn, not very sociable or sportive; profoundly deferential toward the faculty; quietly determined on college honors and ambitious along the line of life he subsequently followed. “While in college, he deservedly held the place of *primus inter pares*.” He was a member of the Alpha Chapter of the Phi Gamma Delta Fraternity.

these advantages of the small college enough to offset the wider life and greater opportunities of large universities, and he noted with pride the distinction and general usefulness of the lives of the men he had known at college.²

In addition to the other good and obvious things, he there acquired the best of them all—a friend. His intimacy with a Scotch-Irish lad, Eugene M. Wilson, utterly lacking in hysteria, was simple, faithful and serene. Unbroken and unmarred, it endured during the long lives of both. Wilson seems to have graduated in 1852, Mitchell in 1853 with highest honors. He went immediately to his friend's home in Morgantown, then in Virginia, and now in West Virginia. There he studied law in the office of his friend's father, Edgar C. Wilson. For two years he taught in the Morgantown Academy. The slender youth, sensitive in feeling, sympathetic by nature, enjoyed and profited by the hospitality of the south, more gracious and more graceful than the plain living and rigid mannerisms with which he was familiar in the north. He came to understand the

² Among his other college friends who did not enter the ministry were Silas M. Clark, elected to the Supreme Bench of Pennsylvania in the same year in which Judge Mitchell was first elected to the Supreme Bench of Minnesota; Thomas Ewing, for many years President Judge of the Court of Common Pleas at Pittsburgh; Judge Ebenezer Haft, of California; Augustus Landis, Judge of Court of Common Pleas, Blair County, Hollidaysburg, Pa., and Rush Clark, who was a member of Congress from 1876, until his death in 1878. Of his classmates, forty-two in all, thirty-six graduated, ten practiced law, thirteen entered the ministry, four practiced medicine; many served with distinction, and some died in the Civil War.

southern people and southern problems. In 1857 he was admitted to the bar, and with his friend left for the west.

When the side-wheels of their Mississippi steamboat stopped at Winona, Minnesota, on the 6th day of April, 1857, the venturesome tyros walked up from the landing through the scattered wooden houses of its main street, and were received in a buoyant spirit of hope, helpfulness and happiness by the pioneer villagers. The local Indians based their assumption of superiority to all others upon the belief that the center of the earth was at the mouth of the Minnesota river, directly beneath the center of the heavens; in evidence of which with Milesian simplicity they adduced the fact that one standing there would find the horizon equally distant at all points. To this conviction of the unapproached excellence of their environment, the early settlers succeeded. Nor was this disturbed, at the time the Virginia lawyers arrived, because that most fragile of financial bubbles, known as the "Town site Boom,"^{*} which was blown in the flush years of 1855 and 1856, had exploded in 1857. That frontier was no place for the faint-hearted or weak-kneed. It was the "idiotic optimism of the west" which held together the coon-capped and buckskin-clad sharpshooters of

^{*} Judge Mitchell had no connection with any town-site boom; but in 1858 he and his friend Eugene Wilson took government claims in what they called Monongalia county, after the Monongahela river, which is now part of Kandiyohi county. The town, Irving, the name of a dead sweetheart of Mr. Wilson in Virginia, is still on the map.

the First Minnesota at Gettysburg when they broke the charge of Pickett's Brigade, while their kinsmen were keeping the red men separated from the white men's scalps. It kept their families going while wild beasts devoured their flocks, and grasshoppers their fields. It helped them when they all came back home, to whistle and work after a cyclone had carried away what fire and famine and flood and drought had left. It justified them in their faith, until they attained their present heritage, greater than the dreams of the seer whom Proctor Knott made famous. This hopeful self-reliance and courage of conviction, but not this optimism, became parts of young Mitchell's character and mind.

Anomalous as it may seem, the conditions were most favorable to his highest intellectual development. The crudities of his surroundings were objective, not subjective. He was one of a typical group of frontiersmen, not as they are caricatured, but as they really were, strong, scholarly men, worthy to be Empire Builders. "As iron sharpeneth iron, so a man sharpeneth the countenance of his friends." The friends of William Mitchell conducted directly to his greatness. His first partner, his college chum, Eugene M. Wilson, appointed United States District Attorney in 1857, was elected in 1868 to the National Congress in which his father and grandfather had served; and in 1888 failed of election as governor of his state, because he was nominated by the Democratic party. A later partner,

W. H. Yale, was, however, elected lieutenant governor, and is now marshall of the Supreme Court of Minnesota. Another partner, Daniel S. Norton, graduated from Kenyon College, Ohio, served with distinction in the Mexican War, and died while in the United States Senate. Of his intimate friends, Earl S. Youmans, a brother of Professor Youmans of the Popular Science Monthly, although a rich and extensive lumberman, thundered against the protective tariff on lumber with a wisdom which attracted general and surviving interest, and with a prescience which foretold the disaster now written on the pine barrens of the northwest. Another, Thomas Wilson, for some time Chief-Justice of Minnesota, a representative in Congress from 1887 to 1889, and now a distinguished railroad counsel, was defeated by a very small margin for governor on the Democratic ticket. Another, William Windom, of Quaker descent, a graduate of Kenyon College, and a college chum of Senator Norton, served in the House from 1859 to 1869, and the best part of four terms in the United States Senate, accepted the Treasury Portfolio in the Cabinet of President Garfield, and died while he was secretary of treasury under President Harrison. In more states than one, it has happened that "the great men came first."

The young Scotchman found immediate professional success and personal happiness. The understanding and affection between him and the new community was instantaneous; and continued during

his whole life. The local city council witnessed his first entry into public life. He was within the territory at the birth of the state of his adoption. As a member of the judiciary committee of the Second Legislature, 1859-1860, he stood in *loco parentis* to part of the framework of its system of laws. For one term he administered those laws as county attorney. For many years he was engaged in active practice.

Social relations in the community to which young Mitchell came had their bases in answer to the question, "What can I do to help you?" Judge Mitchell all through life practiced that spirit of helpfulness. He assisted the infant industries of the ambitious town. He helped friend or stranger according to his needs. To one young boy, for example, who enjoyed the advantageous combination of a heritage of poverty, with an endowment of ability and character, he extended tactful, material and sustained assistance. Admitted to the bar, elected to Congress, and now Chairman of the Ways and Means Committee, that boy, James A. Tawney, loves the great man who is gone as a grateful son loves his father.

William Mitchell came to his own because of that same spirit of helpfulness in this embryonic community. An opposing counsel in those days, Judge Severance, who still survives, says that literally and not in any extravagance of undeserved eulogy, "he was the paragon of courtesy as a practitioner." In practice he was recognized as self-reliant, but not as

self-confident; as honest and brave, but not as aggressive; as wise in the law, and strong before courts; as convincing before juries, but not notable as an advocate. He was respected for his learning, loved as a man, but he was not dreaded as an opponent. Indeed, his gentle and kindly nature inclined him to shrink from combat with his more bellicose brethren at the bar. His friends recognized, perhaps, *more* clearly than he himself, his peculiar fitness for the bench. In 1874, they elected him judge of the District Court of the third judicial district, corresponding to the common law court of Common Pleas. This was done without effort or assistance on his part; he was "elevated by natural gravitation."

In 1877, the Supreme Court, then consisting of three members, two of whom had been of counsel in the case, was called upon to decide the case reported as *State of Minnesota vs. Young*.⁴ Accordingly the governor appointed two district judges, William Mitchell and Samuel Lord, to sit with Justice Berry, as Justices of the Supreme Court, *pro hac vice*. The case was heard and determined by the Court, as thus constituted. Judge Mitchell, writing the *opinion*, held, *inter alia*, the advanced doctrine, that parol authority is sufficient to authorize the filling of a blank in a sealed instrument, and that such authority may be given in any way which it might be given in case of an unsealed instrument. The decision, excellent in itself, met with general approval and served

⁴ 23 Minnesota Reports, 551.

to call him to general attention of the legal profession, which had none too much reverence for medieval survivals.

At the expiration of his full term, in 1880, he was reelected, again by public sentiment, and without any seeking on his own behalf. All members of the bar practicing before him agree that he was an almost perfect *nisi prius* judge. What Burnet says of Sir Mathew Hale, applies to him: "He did not affect the reputation of quickness and dispatch by a hasty and captious hearing of counsel. He would bear with the meanest and gave every man his full scope, thinking it was much better to lose time than patience." ⁵ His official duties were not oppressive but stimulating. Simple in manner, unpretentious in life, he had the natural gravity of mind and character which increased the regard of the community. Humor, culture and a geniality, which had supplanted his immature taciturnity endeared him to his numerous intimate friends. This esteem universally extended to him the Anglo-Saxon respect for the bench and the reverence of foreign settlers for the highest personal representative of the power of the state, gave him the dignity without the cares of an "uncrowned king," as the district judges of that locality are referred to, without satire.

The church of his forefathers he steadfastly attended and supported. In it he reared his family. His Scotch loyalty preserved his association with the

⁵ Life of Mathew Hale, by Gilbert Burnet, p. 177, ed. of 1681.

Presbyterians, but without actual membership in their organization; for his private religious convictions, never disputatiously exhibited, but frankly expressed on appropriate occasions, had undergone more radical changes than had been affected by the progress of thought and knowledge in that denomination. . . .

His domestic life was as serene and happy as it was unsullied.* At this time he was making and saving money enough to conform to his modest necessities and tastes; but not enough to cause a waste of any considerable time or energy. While he was always of opinion, that in the classical dispute between *Venator* and *Piscator*, his revered brother of the angle clearly prevailed, he enjoyed the abundant and varied hunting all about him. But his greatest relaxation was in the fisherman's paradise at his very door. Even his beloved *Nepigon* was not far away. The cultivation of native trees, shrubs, plants and flowers, and of the rarer ones, which he imported, filled full the cup of his simple pleasures. And I think we can say, that after the troubles of the *Vicar of Wakefield* had ended, he was no more contented,

* Shortly after Judge Mitchell had definitely "located" in Minnesota, he married, in Morgantown, Va., a widow with one child, Mrs. Jane Hanway Smith. She died in 1867, leaving three daughters, who still survive, Mrs. J. K. Ewing Jr., of Pittsburgh, Pa.; Mrs. Frank A. Hancock of Evanston, Ill., and Mrs. H. L. Staples of Minneapolis, Minn. In 1872, he married Mrs. Frances M. Smith, of Chicago Ill., a daughter of Jacob D. Meritt of Dubuque, a widow with one child. She died in 1891, leaving their son, William D. Mitchell, born in 1874, and now practicing law in St. Paul, Minn.

and shed no more happiness about him than did William Mitchell.

In 1881 by act of the Legislature, Chapter 141, the Justices of the Supreme Court of Minnesota, were increased from their former number, three, to their present number, five. Governor John S. Pillsbury, with an eye single to their fitness and with no reference to political affiliation or service, appointed the two extra judges, namely: Greenleaf Clark of St. Paul, and William Mitchell of Winona. Judge Mitchell had been a Republican; he had gone to a Pennsylvania College. But his southern associations and marriage made the reconstruction measures of President Johnson's time so odious that for this reason and for other reasons, he became a Democrat; and a Democrat he remained the rest of his life. He and Judge Clark served out the term beginning March 4th, 1881. In accordance with the state constitutional provision, their successors were to be elected at the next general election—which occurred in 1882. Justice Mitchell was reëlected; Justice Vanderburg succeeded Justice Clark. In 1888 and in 1894, Justice Mitchell was renominated by both parties, and was reëlected. In 1891 President Harrison signed his appointment to the Eighth Circuit Court of Appeals, and sent that appointment to the Senate. At the last moment it was recalled for a number of reasons, none of which concerned him personally.

Having served on the State Supreme Court for a

period of nineteen years he accepted the nomination for reelection tendered by the Populist and Democratic conventions, in 1900. In the Republican convention subsequently held, 300 delegates, of whom the writer was one, strove to secure the indorsement of that nomination. In this they had assistance from judges, lawyers and teachers in all parts of the country. Professor Thayer, of Harvard, wrote to a prominent Minnesota lawyer: "I have long recognized Judge Mitchell as one of the best judges in this country, and know also the opinion held of him by lawyers competent to pass opinion on such questions. There is no occasion for making an exception of the Supreme Court of the United States. On no court in the country to-day is there a judge who would not find his peer in Judge Mitchell. That he has been considered in the highest circles for the bench of the Supreme Court of the United States is, I dare say, known to you as it is to me . . . To keep him on the bench is a service not merely to Minnesota, but to the whole country and to the law." Many adverse influences were arrayed against his renomination. The failure of the opposing parties to follow the lead of the Republican party in previous elections to nominate a non-partisan bench, the trading in the convention due to a close struggle for the nomination for governor, the force given to considerations of locality, the mania for vituperation of the bench which temporarily possessed the bar, the inconsistent opposition of great vested interests, because of sup-

posed populist rulings, and of radicals, because of imaginary corporation leanings, all these and other influences frustrated the effort to secure his indorsement. It is to the honor of the gentlemen who were nominated that none of them directly opposed Judge Mitchell; none of them sought to prevent his re-nomination or personally advance his own candidacy. The election resulted in his defeat by a narrow margin. Without bitterness, and without lamentation, but saddened, Judge Mitchell left the bench an old and a poor man, literally worn out by service as unparalleled in his state in its extent as it was unappreciated in merit. He retired to private practice with his son, refused to consider an appointment as Chief-Justice of Porto Rico, and died on August 21st, 1900, at Lake Alexandria, Minnesota.

After he had been raised to the Supreme Bench, he retained his residence in Winona, and returned to it, from the sessions of the court, which were all held in St. Paul, every Saturday until the death of his wife, in 1891; subsequently he lived in St. Paul. The great mass of court work demanded all his time and energy. His life became largely impersonal. This machine-like existence, while it diminished his pleasures, detracted not in the least from what is, after all, perhaps, the best thing in life, interest in work.

Among the conspicuous cases of general interest, in which he wrote opinions, one of the first was the Minnesota Railroad Bond case. By the constitutional amendment of March 9th, 1858, bonds in aid

of railways were authorized to be issued upon satisfactory evidence of the completion of ten miles of way. Not a mile of way was in fact constructed, but bonds to the extent of \$2,275,000 were issued. A constitutional amendment of 1860 provided that no law making any provision for any payment on such bonds should take effect until adopted by a majority of the state electors. As the result of Governor John S. Pillsbury's phillipic, against what he regarded as infamous repudiation,—and, the rumor is, of judicious gilding of local statesmen—in 1881, a legislative act referred the determination of the constitutional questions concerning the payment of the bonds to a number of judges. Before that tribunal sat, the issues were taken to the Supreme Court by writ of prohibition. That court held that the constitutional amendment requiring the submission of all liquidating legislation to the vote of the people violated the provision of the Federal Constitution prohibiting the impairment by the act of a state legislature of the obligation of a contract.⁷ The bonds were thereupon adjusted to the satisfaction of the bondholders. In *Secomb vs. Kittleson*⁸ (in which Judge Mitchell wrote the opinion), it was held that under the act of the special session of the Legislature in 1881, confirming the adjustment, an injunction would not lie to restrain the state treasurer from executing that satisfaction so agreed upon. In his later years he ex-

⁷ *State of Minnesota vs. Young*, 29 *Minnesota Reports*, 474.

⁸ 29 *Minnesota Reports*, 555.

pressed regret at this decision, especially because he had concluded that the bond issue was a fraud from beginning to end, and that the claimants under the bonds were not *bona fide* holders.

In the "Railroad Land Grant Cases" his opinions settled controversies on important points in many western states, which had received that form of government aid, and were generally recognized as of great merit. One opinion, held that a state could tax such lands after they had been conveyed to a railroad company by the state, pursuant to the Act of Congress, and after such railroad company, paying a tax of three per cent on its gross earnings, in lieu of all other public charges, had transferred all its property used for operative purposes to another corporation.⁹ This conclusion was confirmed by the Supreme Court of the United States.¹⁰

The earliest stage, one of Russell Sage's eccentric lawsuits, was brought up before Calvin L. Brown, then on the District Court, now on the Supreme Court of Minnesota, upon stipulated facts. In *Sage vs. Swenson*,¹¹ Judge Mitchell affirmed the ruling of Judge Brown, and applied to the facts in that case the rule, that while a railroad company after a grant of land has no vested right by a mere executive with-

⁹ *County of Redwood vs. Sinons & St. Peter Land Co.*, 40 Minnesota Reports, 512; 42 Minnesota Reports, 181.

¹⁰ 159 United States Reports, 526. Part of Judge Mitchell's opinion therein quoted was subsequently set out in full and approved in *Weyerhauser vs. Minnesota*, 176 United States Reports, 550.

¹¹ 64 Minnesota Reports, 517.

drawal from entry and settlement of lands within either its "place" or "indemnity limits," yet so long as the withdrawal continues in force, the lands are not subject to entry and settlement and no lawful settlement on them can be acquired. An appeal from this decision was immediately taken to the Supreme Court of the United States. Meanwhile the multitude of settlers whose interests it injuriously affected began to inquire into the facts of the case. As a result when it came before the Supreme Court at Washington, the attorney-general was directed by that court to investigate the good faith of the litigation; and on his report the cause was stricken from the calendar and was never argued. The facts were that Swenson had no knowledge of ever having been sued, and that he had never employed an attorney to defend the action. Its sole purpose was to establish a rule of law favorable to Russell Sage in a case in which his counsel appeared for both sides, on a distorted state of facts. The attempted "rape on the Court" did not succeed.

Judge Mitchell's decision in *State vs. Corbett*,¹² holding that a Minnesota law, which legislated ticket scalpers out of business, was constitutional, has been the occasion of much discussion, in and out of court, favorable and unfavorable, but stood unquestioned until 1905, when in *State vs. Manford*,¹³ the question was reargued and the *Corbett* case affirmed.

¹² 57 Minnesota Reports, 345.

¹³ 79 Minnesota Reports, 173.

One interesting point on reargument concerned *Burdick vs. People*,¹⁴ which the Corbett case in part rested. *In re Burdick*,¹⁵ sets forth that subsequently a number of ticket brokers, as *amici curiæ*, petitioned the court to expunge the opinion in 149 volume of Illinois Reports,¹⁶ from the records and reports of the court for the reason that said cause was fictitious and collusive, and that the opinion and judgment had been obtained by collusion and fraud practiced on the court. Affidavits affirming and denying the charge were filed, but the court refusing to determine the merits of the controversy, did not disturb its previous holdings.

Judge Mitchell's progressive liberality of thought is well illustrated in the Sunday cases. In *Brimhall vs. Van Campen*,¹⁷ Judge Flandrau had based the legal observance of that day upon religious dogma. "This Sunday act can have no other object than the enforcement of the fourth of God's Commandments, which are a recognized and excellent standard of both public and private morals." In *State vs. Petit*,¹⁸ Judge Mitchell rested it upon a police regulation of the state for the promotion of the physical, mental and moral welfare of the citizens, established, as a civil and political institution; and, as some particular day must be fixed, the one most naturally

¹⁴ 149 Illinois Reports, 600.

¹⁵ 162 Illinois Reports, 48.

¹⁶ Page 600.

¹⁷ 8 Minnesota Reports, 13.

¹⁸ 74 Minnesota Reports, 376.

selected is that which is regarded as sacred by the greatest number of citizens, and which by custom is generally devoted to religious worship, or rest or recreation, as this causes the least interference with business or existing custom. That reasoning and his conclusion were approved by the Federal Supreme Court, in *Petit vs. State of Minnesota*.¹⁹

When general commercial disaster gave new life to questions concerning the theory and practice in proceedings by creditors to compel stockholders in insolvent corporations to contribute for the benefit of such creditors, to the full extent of their stockholders' liability, he rendered an important and far-reaching decision, to the effect that the constitutional provision imposing such liability was self-executory.²⁰ In *Whitman vs. Oxford National Bank*,²¹ the same question came for the first time before the Federal Supreme Court, under the constitution of another state. That court accepted Judge Mitchell's decision alone as sufficient authority for the general proposition, and cited no other case on that point. In *Hospes vs. Northwestern Manufacturing Co.*,²² Judge Mitchell abandoned the old notion of the trust doctrine and implied contracts, and placed the rule on which the equitable right of creditors against corporate stockholders was based, squarely on the doctrine of fraud. This doctrine has been generally

¹⁹ 177 United States Reports, 164.

²⁰ *Willis vs. Mabon*, 48 Minnesota Reports, 140.

²¹ 176 United States, 559.

²² 48 Minnesota Reports, 176.

accepted. The decision has been cited in other states, times without number, and stands to-day as one of the leading expositions of the law it enunciated. An essential part of his language in this case, is substantially that of Mr. Charles W. Bunn, of counsel.²⁸ In so using the expression, which best fitted the occasion, Judge Mitchell followed approved precedent. Mr. Horace Binney has pointed out that in *Gibbons vs. Ogden*, Chief-Justice Marshall incorporated large extracts from the briefs and writings of Alexander Hamilton. So he also used bodily passages and continually phrases which it is schoolboys' knowledge were also used by Daniel Webster. Other investigators insist that Daniel Webster, in his turn, used the words as well as the ideas of Jeremiah S. Black, which merely proves that, "A good Bar makes a good Bench."

The decisions of Judge Mitchell were marked by an absence of provincialism. The current jest about the Mississippi justice, who, after the war, punished for contempt a young lawyer who cited Massachusetts authorities, is being constantly paralleled in the north, as by the experience—literally true—of a western publisher who pronounced excellent the manuscript of a Massachusetts professor for a book of real estate law, save that it quoted only the decisions of the English Courts, of the Federal Supreme Court and of the Massachusetts courts. To which that pundit replied, "that is all the law there is in

²⁸ 48 Minnesota Reports, 180, 192, 193.

America." Judge Mitchell was conspicuously free from gaucheries in style and judgment. His state was at the beginning of its history. Of its legal problems, most were unsolved, many were untouched. The whole field of jurisprudence lay open for his gleaning. Born in Canada, educated in Pennsylvania, admitted to the bar in Virginia, and developed in Minnesota, he was free from the inertia of accepted theories; he was subject to neither bucolic nor metropolitan predisposition. His mind was scientific. It was a wide-open door to *truth*. In consequence, his decisions were the result of the most thorough investigation of the law of all states and countries, and owe no little of their recognized eminence to the almost unerring certainty with which he selected the wisest of current opinions and formulated the rule of law most nearly true in itself and best adapted to his environment. They register a deliberate and conscious effort to bring about, as far as could be, a uniformity of decisions between the various states so that the country might stand as *the* antithesis of the abomination of the foolishly diverse and local regulations of the petty German states. For example, with respect to whether or not a bill of lading is negotiable, in the sense in which a bill of exchange or a promissory note is negotiable, where the purchasers need not look beyond the instrument itself, or whether it is a receipt for goods, which is susceptible of explanation or contradiction, the same as any other receipt, the decisions of the various states

were directly opposed to each other. After a review of them, Judge Mitchell said:

On questions of commercial law, it is eminently desirable that there be uniformity. It is even more important that the rule be uniform and certain than that it be the best one which might be adopted. Moreover, on the questions of general commercial law, the Federal Courts refuse to follow the decisions of the State Courts, and determine the law according to their own views of what it is. It is therefore very desirable that on such questions the State Courts should conform to the doctrine of the Federal Courts. The inconvenience and confusion that would follow from having two conflicting rules on the same question in the same state, one in the Federal Courts and another in the State Courts, is of itself almost a sufficient reason why we should adopt the doctrine of the Federal Courts on this question. To do otherwise so long as the jurisdiction of those courts so largely depends on the citizenship of suitors, would really result in discrimination against our own citizens.

He accordingly held that a bill of lading, issued by a station or shipping agent of a railroad company, or other common carrier, without receiving the goods named in it for transportation, imposes no liability upon the carrier, even to an innocent consignee or endorsee, for value, and that the rule is the same whether the act of the agent was fraudulent and collusive, or merely the result of mistake.²⁴

The value of his common law training in ridding his mind of the erroneous preconceptions of a law-

²⁴ *National Bank of Commerce vs. Chicago, Burlington & Northern Railway Co.*, 44 Minnesota, 224, affirmed in *Swedish American National Bank of Minneapolis vs. Chicago, Burlington & Quincy Railway Co.*, 105 Northwestern Reports, 469.

yer brought up under the code merely, is evident in his view of the jurisdiction of the probate court over real estate. In the common law states, speaking generally, lands upon the death of the owner, descending to and vesting in the heirs, have no concern with probate proceedings, unless there is occasion to resort to them when the personal estate is not sufficient to pay debts. There is no necessity, and often no provision for decreeing the title in the heirs. A trust in executors as to lands, lasts, accordingly, only so long as the administration proper exists, although under the terms of the trust, it might continue; for example, until all real estate is converted into personalty and distributed according to the terms of the trust. On the other hand, in the so-called code states, the current impression, and sometimes the decisions, are that when the ordinary notices for the probate of a will, or appointment of a representative of the estate, have been served, the court has the same jurisdiction as to the realty which it has as to the personalty. For example, under the common law theory, an administrator can not maintain an action for trespass upon real property, committed after the death of an intestate, unless he has first asserted his right under the statute, by taking possession of such real property, or by otherwise bringing it within the powers and jurisdiction of the probate court. Under the erroneous and confused code theory, the administrator could maintain such an action. In *Noon vs.*

Finnegan,²⁵ Judge Mitchell announced the common law rule, while Judge Gilfillan, in his dissenting opinion, held to the misconception, natural to a code lawyer. So also, in his dissenting opinion, in *Hungerford vs. O'Brien*,²⁶ Judge Mitchell endeavored to keep his state in line of the common law as to the liability of guarantors. He insisted that the guarantor was entitled to notice of the maker's default, and did not necessarily become absolutely liable, on default of the maker. In the same way he manifested his sympathy with the preservation of the convenient forms of old common law pleading, on the common counts, as for money had and received, notwithstanding the attempted abolition of all forms of action by the code.²⁷

That sound common-sense, which is a necessary part of the endowment of every great judge, he possessed in abundance. Of a metaphysical lawyer he once said: "He puts the fodder up so high that I can't reach it." But his judgments evidence a profounder faculty and reflect a power of logic suggestive of John Stuart Mill.

The precision of his analysis is well illustrated in the rule for determining what is approximate, and what is a remote consequence, of the wrongful act. The English courts, at one extreme, held that the rule is the same with respect to the remoteness of

²⁵ 29 Minnesota Reports, 418.

²⁶ 37 Minnesota Reports, 306.

²⁷ See *Brand vs. Williams*, 29 Minnesota, 238.

damages, whether the damages are claimed in contract or in tort, and substantially followed *Hadley vs. Baxendale*.²⁸ The Supreme Court of the United States, in language used in a large number of cases, announced the confused test, that it must appear that the injury was the natural and probable consequence of the negligence, or wrongful act, and that it ought to have been foreseen, in the light of attending circumstances.²⁹ In *Christianson vs. Railroad Company*,³⁰ Judge Mitchell gives the true rule, not it is true, for the first time in the history of the law, but with certainty and with clearness. He pointed out that the other statements of the law *confounded* the definition of negligence with that of proximate cause, and held that where an act is negligent, the person committing it is liable for any injury proximately resulting from it, although he could not have reasonably anticipated that injury would result in the form or way in which it did, in fact, happen.

Of his decisions, the one which has occasioned the most reasonable and pertinacious criticism, is his concurring opinion in *Sheehan vs. Flynn*.³¹ In substance he there held that a land-owner may drain his land of surface water by artificial ditches, although the effect is to cause the water to pass more rapidly

²⁸ *Sharp vs. Powell*, Law Reports, 7 Common Pleas, 253.

²⁹ *Milwaukee, etc., Railway Co. vs. Kellogg*, 94 United States Reports, 469.

³⁰ 67 Minnesota Reports, 94.

³¹ 59 Minnesota Reports, 449.

and with increased volume on to adjacent land of his neighbor if the same water would not naturally flow in some other direction, and he acts with proper regard to his neighbor's welfare. The underlying theory, more clearly set forth in Mr. Justice Canty's opinion, of "comparative injury" done by the "common enemy" surface water, is persistently debated. It is difficult to see how the standard of one man's right can be determined by the extent of another man's advantage. On the other hand, his opinions with regard to navigable waters and riparian rights, have received general approbation and satisfactorily determined the law on that subject.⁸²

A discriminating critic having a large familiarity with Judge Mitchell's opinions, has attributed their excellence to his power of illumination. In point of fact Judge Mitchell had no peculiar style and indulged in few idiosyncrasies of utterance. He affected no judicial eloquence. He did his work without friction. His language was simple, not labored, and had a smoothness and grace that was purely natural. Like most men who think clearly, he wrote clearly. His phrases were always lucid, rarely picturesque; never bizarre. He once referred however to an imperfect brief as containing "scrambled facts." His single intent was fully and accu-

⁸² Bradshaw vs. Duluth Imperial Mill Company, 52 Minnesota Reports, 59; and especially Lamprey vs. State, 52 Minnesota Reports, 181. City of St. Paul vs. C., M. & St. P. Railway Co., 63 Minnesota Reports, 330.

rately to formulate the law; to that end he used the best expressions of his views which he could find or invent, indifferently and with little regard to quotation marks. As a result the wayfaring man, though a lawyer, could not err in understanding what he had written. A good illustration of his faculty for good expression is to be found in *Morss vs. Minneapolis & St. Louis Railway Co.*³³ After referring to the rule previously laid down in Minnesota, permitting evidence of repairs after an accident which resulted in personal injuries as an admission of previous unsafe condition, he said:

But, on mature reflection, we have concluded that evidence of this kind ought not to be admitted under any circumstances, and that the rule heretofore adopted by this court is on principle wrong; not for the reason given by some courts, that the acts of the employees in the making of such repairs are not admissible against their principals, but upon the broader ground that such acts afford no legitimate basis for construing such an act as an admission of previous neglect of duty. A person may have exercised all the care which the law required, and yet, in the light of his new experience, after an unexpected accident has occurred, and as a measure of extreme caution, he may adopt additional safeguards. The more careful a person is, the more regard he has for the lives of others, the more likely he would be to do so, and it would seem unjust that he could not do so without being liable to have such acts construed as an admission of prior negligence. We think such a rule puts an unfair interpretation upon human conduct, and virtually holds out an inducement for continued negligence.³⁴

³³ 30 Minnesota Reports, 465, 468.

³⁴ In 1 Shearman & Redfield on Negligence (5th edition), section

By party affiliation a Democrat, Judge Mitchell has been charged with having carried his Jacksonian theories of government into his opinions. That imputation, often made, during the heat of political campaigns, has been regarded by the disinterested men in the profession as unjust and by his friends as shameful. It was unfounded in fact but unfortunate in effect. None of his opinions evidence any partisanship. Most of his expressed *a priori* theories of government would have appeared equally obvious to a Federalist as to a Jeffersonian; some of his conclusions would have been rejected by both.

There was, for example, no preconception for or against paternalistic government in his restriction of the state to its natural functions. In *Rippe vs. Becker*,⁸⁵ an action was brought to restrain the state board of railroad and warehouse commissioners from building a state elevator at Duluth. Writing the opinion of the court, Judge Mitchell held the act authorizing that construction to be unconstitutional, because the work was not in the exercise of the police power, but was a work of internal improvement, and prohibited by the Constitution. After a characteristically able examination of the law itself, of the

60c, page 84, note 3, we find this comment: "The best statement of this rule, and the reasons for it, is in *Morss vs. Minneapolis, etc., Railway Co.*, 30 Minnesota, 465; 16 Northwestern Report, 358. The rule has been repeatedly enforced in New York, although never with a statement of reasons approaching to the clearness of Judge Mitchell's opinion in the Minnesota case."

⁸⁵ 56 Minnesota Reports, 100.

authorities applicable to it and of the relevant general principles, he said:

The time was when the policy was to confine the functions of the government to the limits strictly necessary to secure the enjoyment of life, liberty, and property. The old Jeffersonian maxim was that the country is governed the best that is governed the least. At present the tendency is all the other way, and towards socialism and paternalism in government. This tendency is, perhaps, to some extent, natural as well as inevitable, as population becomes more dense, and society older, and more complex in its relations. The wisdom of such policy is not for the courts. The people are supreme, and, if they wish to adopt such a change in the theory of government it is their right to do so, but in order to do it they must amend the constitution of the state. The present Constitution was not framed on any such lines.

His position as to the defense of individual liberty in trade combinations, which appears in *Bohn Manufacturing Co. vs. Hollis*,³⁶ has been generally commended and followed. Whether sound or not, it was clearly the result of independent judgment. There a large number of retail dealers formed a voluntary association by which they mutually agreed that they would not deal with any manufacturer or wholesale dealer who should sell lumber directly to consumers, not dealers, at any point where a member of the association was carrying on a retail yard, and provided in their by-law, that whenever any wholesale dealer or manufacturer made any such sale their secretary should notify all members of the fact. The result according to the complaint, would have been

³⁶ 54 Minnesota Reports, 223.

a substantial loss of custom by such wholesale dealer or manufacturer. The plaintiff having made such a sale, the secretary threatened to send notice of the fact, as provided by the by-laws, to all members of the association. Plaintiff brought an action for a perpetual injunction. Judge Mitchell refused to grant that injunction, and held that any man, unless under contract obligation, or unless his employment charges him with some public duty, has a right to refuse to work for or deal with any man or class of men, as he sees fit; and that this right, which one man may exercise singly, any number may agree to exercise jointly.⁸⁷

Encroachments by the judiciary upon the function of coördinate branches of the government, he avoided upon indisputable principles. In *Moede vs. County of Stearns*,⁸⁸ held that the action of a county board in forming a school district, is legislative and not judicial and is therefore not reviewable on *certiorari*. Judge Mitchell said:

There is no country in which the distinction between the functions of the three departments of government is more definitely

⁸⁷ This opinion has been universally cited and almost universally approved. Of it a distinguished academician wrote: "If Judge Mitchell had never rendered his state and its jurisprudence any other service than the writing of this opinion, it would have entitled him to remain on the Supreme Bench during his life." As to clearness, succinctness and usefulness, this opinion contained in five and one-half pages, is in conspicuous contrast with the leading English case, *Allen vs. Flood*, Law Reports Appeal Cases 1, (1898), contained in 180½ pages.

⁸⁸ 43 Minnesota Reports, 312.

marked out on paper than in the United States, and yet there is none in which the courts have assumed so often to review, in advance of actual litigation involving the question, the acts of coördinate branches of the government. It has become the fashion to invoke the court by direct action, or through some remedial writ to review almost every conceivable act, legislative, executive or ministerial, of other departments; and courts have been so often inclined to amplify their jurisdiction in that respect that they have not unfrequently converted themselves into a sort of appellate and supervisory legislative, or executive body. Such a practice is calculated to interfere with the proper exercise of the functions of executive and legislative officers or bodies; to obliterate the distinction between the powers and duties of the different departments of government; and, above all, to bring the courts themselves into disrepute, and to destroy popular respect for their decisions. It may be very convenient to have in advance a judicial determination upon the validity of a legislative or executive act. It would often be equally so in the case of acts of a legislature. But we think the courts will best subserve the purposes for which they are organized by confining themselves strictly to their own proper sphere of action, and not assuming to pass upon the purely legislative or executive acts of other officers or bodies until the question properly arises in actual litigation between parties.

In *Lomen vs. Minneapolis Gas Light Co.*,³⁹ the constitutionality of a law providing for struck juries involved an investigation into the nature of a jury trial and the extent of the constitutional rights therein involved. In sustaining the constitutionality of the law, Judge Mitchell said:

Inasmuch as the legislature is a coördinate branch of the government, the courts do not sit to review or revise their legislative

³⁹ 65 Minnesota Reports, 207.

action; and hence, if they hold an act invalid, it must be because the legislature has failed to keep within its constitutional limits. A court has no right to declare an act invalid solely on the ground of unjust and oppressive provisions, or because it is supposed to violate the natural, social, or political rights of the citizen, unless it can be shown that such injustice is prohibited or such rights guaranteed or protected by the constitution. Except where the constitution has imposed limits upon the legislative power, it must be considered as practically absolute. The courts are not the guardians of the rights of the people, except as these rights are secured by some constitutional provision which comes within the judicial cognizance. The protection against, and the remedy for, unwise or oppressive legislation, within constitutional bounds, is by appeal to the justice and patriotism of the people themselves, or their legislative representatives. Neither are courts at liberty to declare an act void merely because, in their judgment, it is opposed to the spirit of the Constitution. They must be able to point out the specific provision of the Constitution, either expressed or clearly implied from what is expressed, which the act violates. Moreover, courts will never declare a statute invalid unless its invalidity is, in their judgment, placed beyond reasonable doubt.

The power of the state to regulate railway rates, he sustained without a trace of attachment to the conviction that "the best government is the least government." The "*Steenerson Wheat Rate Case*,"⁴⁰ was a proceeding commenced before the state railroad and warehouse commission. It was claimed that the Great Northern charged an unreasonable rate for the transportation of grain and the mill products thereof between certain points. The commission reduced the rate, and the Great Northern appealed

⁴⁰ 60 Minnesota Reports, 461.

to the district court. Thereupon the Northern Pacific, and two other railroad companies made an application to the court to file complaints in intervention. The appeal to the Supreme Court raised the question of the right of a competing line of road to file a complaint in intervention, and of the commission or the court, on appeal to allow intervention, at its discretion, and thus to put such road in position to take part in the trial, and perhaps, control proceedings brought against another carrier to compel a reduction of rates for the carriage of passengers or freight or to remedy some other matter within the purview of the law establishing the railroad and warehouse commission.

The opinion of the court held that the other railroad companies which were not parties to the original proceedings were not entitled to intervene, as a matter of right.

Judge Mitchell in a concurring opinion agreed with the conclusions of a majority of the court, although for a different reason; that such intervention was not a matter of right. In connection with the current agitation on the general subject, it would seem to be of interest to quote this part of his opinion:

The practice adopted in these proceedings only confirms me in the opinion that, both by professional training as well as because of the nature of their modes of procedure, the courts are not appropriate tribunals for the consideration of a question of this character. The tendency of the lawyer as well as the judge is to

liken such proceedings to an action between parties, and to make them conform to the rules as to parties, pleading, and practice which obtain in such actions.

Subsequently the court permitted the Northern Pacific Company to intervene and to introduce testimony in support of the allegations of its complaint in intervention. Upon this appeal by the state,⁴¹ it was held, among other things that the fixing of rates is a legislative or administrative act, not a judicial one, and under the constitution the court can not place itself in the shoes of the commission, and try *de novo* the question what are reasonable rates; and on appeal, under said statutes, the court can review the acts of the commission only so far as to determine whether the rates fixed by it are unreasonable and confiscatory, and to what extent, in much the same manner as an appellate court determines whether or not the verdict of a jury is excessive, and to what extent. That the burden is on the railroad company to show that the rates fixed by the commission are unreasonable. The opinion of Justice Canty was an elaborate one, going into the powers of the commission in reducing rates and the territory to be covered by such reduction; the reasonableness of the same and the test; the burden of proof as to reasonableness and the power of the court on appeal from the commission, in fact the entire question of "fixing railway rates" was discussed in all its details. Judge Mitchell concurred in the result arrived at and in most of

⁴¹ 69 Minnesota Reports, 353.

the grounds upon which it was based, but on account of the importance of the case emphasized some principles which he thought should govern cases of this class. *Inter alia*, he said:

Courts should be very slow to interfere with the deliberate judgment of the legislature or a legislative commission in the exercise of what is confessedly a legislative or administrative function. To warrant such interference, it should clearly appear that the rates fixed are so grossly inadequate as to be confiscatory, and hence in violation of the constitution. It is not enough to justify a court in holding a rate "unreasonable," and hence unconstitutional, that, if it was its province to fix rates, it would, in its judgment have fixed them somewhat higher. Any such doctrine would result, in effect, in transferring the power of fixing rates from the legislature to the courts, and making it a judicial, and not a legislative function. When there is room for a reasonable difference of opinion, in an exercise of an honest and intelligent judgment, as to the reasonableness of a rate, the courts have no right to set up their judgment against that of the legislature or of a legislative commission. In my opinion, it is only when a rate is manifestly so grossly inadequate that it could not have been fixed in the exercise of an honest and intelligent judgment that the courts have any right to declare it to be confiscatory.

Judicial conservatism came to him by nature, training and association. His large knowledge of decided cases was accompanied by a reverential attitude to what had been held to be the law. His decisions incorporate the spirit of Coke's reply to the King: "True it is that every precedent hath a commencement; but where authority and precedent is wanting there is need of great consideration before that anything of novelty be established, and to pro-

vide that this be not against the law of the land." Courage and self-reliance, however, were also inbred and developed. His legal convictions were strong and positive. He freely and sometimes boldly exercised the *vis major* of judicial power. The result was that principle prevailed over precedent. In *Little vs. Railroad Company*,⁴² the owner of lands in Wisconsin, brought suit in Minnesota against the railway company for negligently setting fire to his property in Wisconsin. The Legislature of Wisconsin had, prior to the time at which the alleged damage arose, enacted that all actions for injuries to real property should be tried within the county in which the subject of the action is situated. A long and essentially unbroken line of decisions, including *Livingston vs. Jefferson*,⁴³ in which Chief-Justice Marshall wrote the opinion, established the rule that actions for injuries to lands are local. In considering the evils incident to this rule, most likely to occur in a new country, Judge Mitchell pointed out that "if the rule be adhered to, all that the one that commits an injury to land, whether negligently or wilfully, has to do in order to escape liability, is to depart from the state where the tort was committed and refrain from returning. In such case the owner of the land is absolutely remediless. . . . We recognize the respect due to judicial precedents and the authority of the doctrine of *stare decisis*; but inas-

⁴² 65 Minnesota Reports, 48; 67 Northwestern Reports, 846.

⁴³ 1 Brockenbrough's Reports, 203; 15 Federal cases, 8411.

much as this rule is in no sense a rule of property, and as it is purely technical, wrong in principle and in practice often results in a total denial of justice, and has been so generally criticised by eminent jurists, we do not feel bound to adhere to it, notwithstanding the great array of judicial decisions in its favor."

In *State vs. Thomas*,⁴⁴ it had been held that an indictment for perjury in a form carried forward from territorial days, was good although it failed to specify by assignments of perjury, or their equivalent, wherein the testimony was false. This anomaly occurred in no other state or country. Accordingly, in *State vs. Nelson*,⁴⁵ Judge Mitchell overruled the earlier case because such an indictment did not inform the accused of the nature and cause of the accusation against him. In referring to the doctrine of *stare decisis*, he says:

While the doctrine of *stare decisis* should, within proper limits, be adhered to, yet inasmuch as a constitutional right of the citizen is involved, if the decision in *State vs. Thomas* was erroneous, it ought not to be followed, although it may have stood unchallenged for nearly twenty-five years.

It has appeared in what has been previously written that the prevailing element in Judge Mitchell's life was a passion for justice. That feeling dominated his mind, modeled his character, inspired his labors and ruled his life. Careful not to substitute

⁴⁴ 19 Minnesota Reports, 484.

⁴⁵ 74 Minnesota Reports, 409.

impracticable idealism for the settled rules of law, his sense of the eternal right never consciously veered. Candor was as natural to him as breathing. He was literally without pride of opinion and never allowed inconsistencies in his own rulings to interfere with the final announcement of the nearest approximation to ultimate law. In *Pamperin vs. Scanlon*,⁴⁶ writing the opinion of the court, he said that a creditor redeeming need not pay liens held by the purchaser at an execution or mortgage sale subsequent to that on which the sale was had and prior to that under which he redeemed, if such purchaser has not, with respect to such subsequent lien placed himself in the line of redemption by complying with the statute. A year later he refused to follow the rule therein laid down and dissented from the conclusion of the court sustaining that opinion, although he recognized that the former case had become a rule of property and therefore, ordinarily, even if erroneous should stand. He pointed out that his opinion could have worked no hardship to the defendant in the later case; that the former decision had probably not been followed to any great extent; and that at all events the evils to result from allowing it to stand would probably be greater than those which would follow from its being overruled.⁴⁷ So in *Rosse vs. Duluth*,⁴⁸ he wrote an opinion overruling *Fitzgerald vs. Railroad Com-*

⁴⁶ 28 Minnesota Reports, 345.

⁴⁷ *Parke vs. Hush*, 29 Minnesota Reports, 434.

⁴⁸ 68 Minnesota Reports, 216.

pany,⁴⁹ which held that statutes requiring railroads to fence their right of way applied to cattle only and not to children, and that a child injured on a railroad track could not recover for injuries there received because of the failure to fence. *Inter alia* he said:

The writer, who is the only member of this court who was on the bench when the Fitzgerald case was decided, assumes his full share of responsibility for that decision, but subsequent reflection has convinced him that the court placed too narrow a construction upon the statute; that the views expressed in the dissent of the late Chief-Justice Gilfillan were correct. . . . It is suggested that as the decision in the Fitzgerald case has stood unchallenged for fifteen years, during which the legislature has not, by amending the statute, expressed any dissatisfaction with the construction which this court had placed upon it, therefore it ought not now to be overruled, even although erroneous. The decision is not a rule of property. Neither can railway companies claim to have acquired any right either legal or moral, under it, for it did not repeal the statute, nor relieve them of the duty of fencing their road.

The consistency of Judge Mitchell's mental processes is well illustrated by referring to what is called the fellow-servant cases. At an early stage of the discussion of the later phases of that vexed rule he accepted the doctrine of vice-principal; namely, that he to whom the master delegated one or more of the duties absolutely imposed by law upon the master was a vice-principal and not a fellow-servant; and that the servant, therefore, did not assume

⁴⁹ 29 Minnesota Reports, 336.

the risk of the negligence of such a vice-principal.⁵⁰

To this rule, he adhered despite the virile struggles of his associates for a more satisfactory test; as for the "substantial disparity of knowledge."⁵¹ Meanwhile the Federal Supreme Court with a commendable lack of consistency receded from its original criterion of the superior servant or of the servant having control and passed through various stages of uncertainty concerning the doctrine of vice-principal and of servants in charge of separate departments.⁵²

To a just estimate of William Mitchell, as an appellate judge, it is essential to consider the variety and extent of his judicial labors. When he went upon the bench in 1881, 203 cases were set for argument; in 1890, 590; in 1895, 695 and in 1899 they dropped to 450; the average during his nineteen years of service was 470. The total number on the calendar during his service was 8,930. There were five judges on the bench; Judge Mitchell's aggregate share of the calendar was 1,786. To this number is to be added innumerable concurring and dissenting opinions.⁵³ Judge Mitchell wrote more than 1,600 opinions; how many more than this is not determinable. Much of his work cannot be certainly

⁵⁰ *Hess vs. Adamant Manufacturing Co.*, 66 Minnesota Reports, 79.

⁵¹ *Blomquist vs. Chicago, Milwaukee and St. Paul Railway Co.*, 60 Minnesota Reports, 426; *Carlson vs. Northwestern Telephone Exchange Co.*, 63 Minnesota Reports, 428.

⁵² *Northern Pacific Co. v. Dixon*, 194 United States, 338.

⁵³ His first decision was *Fenno vs. Chapin*, 27 Minnesota Reports, 519; his last, *State vs. Matter*, 78 Minnesota Reports, 377.

identified. Apart from *per curiam* opinions, he prepared in whole or in part many decisions for other members of the bench who were unequal in point of capacity for labor to do their allotted share of the work. No one ever knew this from him, who all his life did kindness so that his left hand knew not what his right hand had wrought. But the grateful testimony of his *confrères*, and especially of one who has recently died, advises us of the existence, but not of the extent of these unrecorded labors. A current estimate, not far from the truth, is that excluding Sundays, and allowing a month in each year for vacation, Judge Mitchell wrote one opinion in every three days for nineteen years. He composed the syllabus, as required by statute, a statement of facts which is rendered desirable, if not necessary by the current method of advanced reporting, and the decision itself. All this was done without the aid of an amanuensis or stenographer. The time consumed in argument, during this period, averaged about four hours a day and the time in consultation about three hours a court day. In chambers, especially in Judge Mitchell's case, a large portion of the remaining day was consumed in consultation between the different members of the court. He examined the decisions of the other judges with a thoroughness to which his many concurring and dissenting opinions bear witness. Proof was read and re-read for two systems of reporting. All this, together with the incessant interruption inevitable in public life, left little day

time for the writing of opinions. If he had been subject to an eight-hour day of law, few opinions would have been written.

Nor could he have done his full work if he had been subject to the tax on time imposed by the requirements of travel in cities of great distances.

In fact he worked night and day, week day and Sunday. Only one who labored as Chief-Justice Hale said he had labored, sixteen hours a day, or the like, could have accomplished the colossal work which Mitchell did. In point of numbers, his opinions exceed those of any other justice of the Supreme Court of his state, or of the nation. His fundamental conception of the duty of the court, lay in Gladstone's maxim, "Justice delayed is justice denied." For many years, the Supreme Court of Minnesota, twice a year, has cleaned up its calendar and decided all cases ready for hearing: so that in all parts of the state, a suitor could, and now can, initiate litigation and receive final adjudication within the period of six months.

The merits of Judge Mitchell's decisions are to be determined in view of these considerations. These conditions imposed a burden and afforded an opportunity. His industry easily bore the burden and his natural ability utilized the opportunity to the uttermost. It may not be justly said that any of his decisions were epochal. Perhaps none of them were momentous. This was inevitable because of the nature of the questions submitted. The constitutional

restrictions upon the jurisdiction of state courts prevent their consideration of the monumental issues, which, usually involving some political controversies, influence the destiny of the nation. When any considerable occasion came, however, he rose to the greatest height it permitted. Some of his opinions were preëminent; an exceptionally large percentage of them were excellent. Their high quality was uniform. In view of the extraordinary rapidity of their production, it is surprising that none of them after the scrutiny of years and the crucial test of continual debate have been found to be inaccurate, immature, or unjustified by sound, although not necessarily conclusive reason and authority. The formulæ of the law stated in general terms he sustained by sufficient, but rarely by superabundant authorities. His opinions were not encyclopædic. He was the logical opposite of these commentators whom Voltaire found in his journey to the Temple of Taste:

What others have with care expressed
With accuracy we digest;
On others' thoughts we spend our ink
But for our part we never think.

Judge Mitchell was a voice and not an echo. He took what other men had thought and decided, made it his own, added the force of his own conception and expression and gave a product to the world which is little by little coming to be recognized as the work of a great master and as an advancement

in the philosophy and administration of our jurisprudence.

His mind was statesmanlike and his work was constructive in an unusual degree. When he arrived in Minnesota, it was an uninhabited wilderness. When he retired from the Supreme bench, it had become a rich and populous commonwealth. In 1857 its population was 150,000; in 1872, when he went upon the district bench, approximately half a million; in 1881 when he went on the Supreme bench 800,000; in 1900 when he retired, approximately 1,800,000. When he entered practice, its system of laws was embryonic; when he completed his judicial service, it possessed a complete, elastic and satisfactory code of municipal law. In the creation of that code he had been a large and most important part. The history, topography, natural resources and environment of the state involved the widest range of intellectual effort and of legal investigation for the selection and determination of the best rules of law and for the correct construction of an exceptionally large quantity and variety of legislation involving as it did many and novel sociological experiments. In consequence, there are few titles in the law appearing before any state courts which are not illuminated by his wisdom.

Mr. Tawney has justly observed: "From the foot-hills of obscurity, Judge Mitchell arose among the mountain-peaks of fame. Exquisite yet tremendous he moved unobtrusively among men, seeking

everywhere with singleness of purpose that noble realm, where across the ages, the friends of justice and of God hold silent converse with each other and their Great Original."

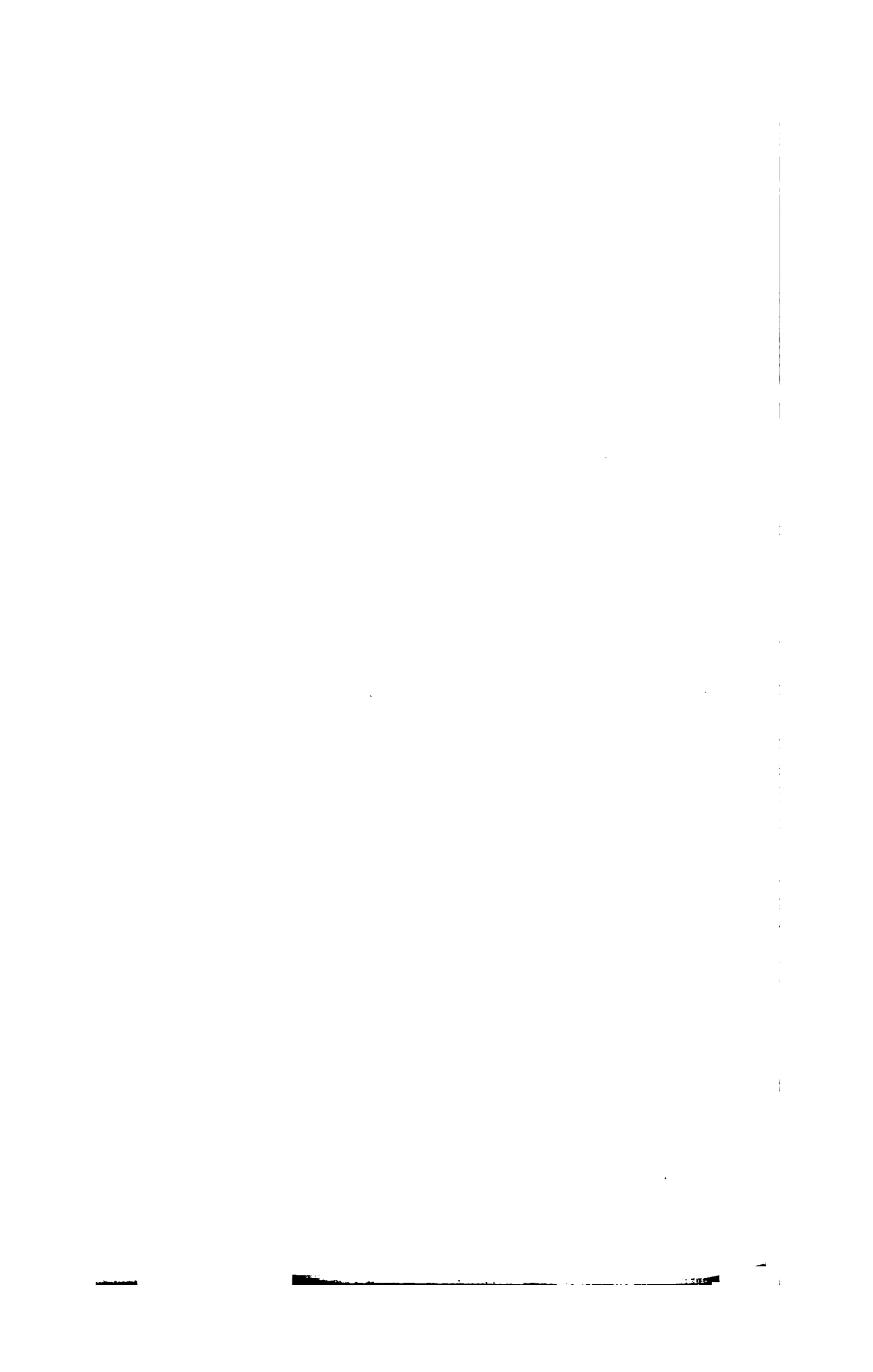
ALBERT HOWELL HORTON.

ALBERT HOWELL HORTON

From a photograph, the property of Mrs. Horton.

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ALBERT HOWELL HORTON

1837-1902.

BY

WILLIAM H. ROSSINGTON,

of the Kansas Bar.

THE year 1859 was a memorable one in the history of the state of Kansas. In that year the state and its institutions, crystallized into organic law, was born, though the birth was not registered or proclaimed by an assent of Congress to an act of admission until two years later. Its parturition, to pursue the figure, had been marked by the storm and stress of a civil insurrection which was the prologue of the war of the rebellion. In 1854, before the Kansas and Nebraska Act was passed, but at a time when a favorable issue to the struggle for its adoption was generally conceded, Eli Thayer, of Massachusetts, took time by the forelock and formed the Emigrant Aid Society. If squatter sovereignty was to dominate the question whether the blight of slavery was to rest upon the new Territory, Thayer and his associates determined to be ready to see that the efforts of the friends of that institution did not win except at the end of a fair and earnest struggle. And when, therefore, the roll was called upon the

final passage of the bill creating the territories of Kansas and Nebraska, the vanguard of the free state company of pioneers from New England was already enrolled for its long journey to the green rolling prairies of Kansas.

It is not within the purpose of this article to deal at any length with the events of this exciting struggle. Certain facts, however, are in a sense pertinent to the subject of the life of every Kansan who had to do with the upbuilding of the state.

The New England emigrants made their settlement with an eye to the natural beauties of the situation at the foot of a high hill near the Kansas river, which they named Mount Oread. The town was called Lawrence, after a citizen of Massachusetts, who was an active promoter of the work of the Society and of the free state cause. From the time of its settlement until resistance to the adoption of a constitution which should guarantee freedom within the borders of the state afterwards to be created had ceased, Lawrence was known as the headquarters and the citadel of the free state cause.

The town of Leavenworth was about the same time or perhaps a little before, created by immigrants from Missouri, there being already on the ground an unorganized community hanging upon the fringe of the Fort Leavenworth Military Reservation, principally of traders, teamsters, guides and scouts, attracted by or attached to this old army post, which had been established in 1827. The town of Leaven-

worth was largely under the control of the pro-slavery element, and it and the town of Westport, in the state of Missouri, were the rallying points of those intent upon the establishment of the institution of slavery in the new territory. The promoters of slavery, however, deemed it wise to organize another border town within the limits of Kansas, between Leavenworth and St. Joseph, to control if possible the invasion of the free-state element, and as a result the town of Atchison was established upon the bluffs of the Missouri river between Leavenworth and St. Joseph, and it was not long before it became to the pro-slavery element what Lawrence was to the free-state faction. It was named after that senator of the United States from Missouri who was at that time President of the Senate, and who was an active leader of an irresponsible mob that moved up and down the border and prevented immigrants from eastern states coming into the territory. Incidentally these landless resolute spent their time in trying to intimidate the settlers who had slipped by their guard and in stuffing the ballot boxes at elections. But the era of violence practically came to an end in 1857, and Atchison was the first to come forward with a flag of truce in one hand and the olive branch in the other, confessing failure and inviting peace.

Certain of the free-state men, notably the late Senator Pomeroy, moved from Lawrence to Atchison, purchased an interest in the town company, established a grist mill, and joined in an invitation to

peaceful citizens to come in and settle amongst them. Within a year from that time an honest election was held for a constitutional convention which assembled at Wyandotte in the summer of 1859 and adopted the constitution under which the state of Kansas was afterwards admitted.

In its bill of rights there was contained that provision copied from the Ordinance of 1787, "There shall be no slavery in this state; and no involuntary servitude, except for the punishment of crime, whereof the party shall have been duly convicted."

In this natal year of the state of Kansas there came from Goshen, New York, to the town of Atchison, the subject of this sketch, Albert Howell Horton, with his brother, Doctor Harvey A. Horton. They came to make it their permanent home and to grow up with the new country.

Albert Howell Horton was born near the village of Brookfield, in the town of Minnisink, Orange County, New York, on the 12th day of March, 1837. He could trace his ancestry in direct line from Robert de Horton, Lord of the manor of Horton, in Lincolnshire, England, in the twelfth century. The family, as the name indicates, was of Saxon origin and existed in England before the Conquest. William Horton, Esq., of Frith House, in Barksland, Halifax, traced his descent lineally from the above-named Robert de Horton. He married Elizabeth, daughter of Thomas Anson, Esq., of Toothill, and died about 1640. The children of this pair were

William Horton of Barksland, or Bark Island Hall, born about 1576, who purchased in the Fifteenth of Charles I., the estate of Howroyde, and Joseph Horton, born about 1573. From Joseph Horton in direct descent came Barnabas Horton, who was born in the little hamlet of Mously, in Leicestershire, on the 13th day of July (old style), 1600. He came over to join his brethren of the Puritan stock, as near as can be ascertained, between 1633 and 1638, in the ship *Swallow* and landed at Hampton, Massachusetts. In 1640 he came to New Haven, Connecticut, and on the 21st day of October in that year assisted the venerable John Davenport and Governor Eaton in organizing a Congregational Church, and thereupon sailed with them to the east end of Long Island, now Southhold. They had all been active participants in the Puritan movement in England. Barnabas Horton built the first frame dwelling house ever erected on the east end of Long Island, and in very recent years that house was still standing and occupied. He died at Southhold on the 13th day of July, 1680, aged eighty years. In the genealogy of the Horton family this venerable man is always referred to as "Barnabas, the old Puritan." He left behind him a savor of true godliness, humble piety, and at the same time the reputation of being a militant defender of personal freedom, both civil and religious.

Albert H. Horton was descended from the third son of Barnabas, who was born in the autumn of

1640, and was called Caleb. Caleb named his first son Barnabas, after the old Puritan. The second son of this second Barnabas also bore the same name and was born in Southhold, Long Island, about 1690. This third Barnabas of the line moved to Goshen, New York, in 1732. The fifth son of Barnabas the third was born in Southhold, Long Island, in 1730, and was named Silas. The sixth child of Silas was born in June, 1770, in Goshen, New York, and was also called Barnabas. He married in 1794 Millicent Howell, and died October 24th, 1823, in Minnisink, Orange county, New York. He was the grandfather of Judge Albert H. Horton. His third child, Harvey, was born in Goshen, New York, on the first day of February, 1800, was married to Mary Bennett, and died on May 10th, 1840. Albert H. Horton was the third and youngest of the children of this marriage. He was sent early to the public schools of West Town, New York, and continued his attendance there until his thirteenth year, when he entered the Farmers' Hall Academy, of Goshen, Orange county, New York, to prepare for college. He chose a western institution and was entered a freshman in the University of Michigan at Ann Arbor, Michigan, in 1855, and there remained until his junior year. A weakness of the eyes which afflicted him through life compelled him to leave college, and in 1858 he entered the law office of Honorable J. W. Gott, in the town of Goshen, New York, as a law student, where he continued until the end of the year, presented himself

for examination as an attorney and counsellor and was admitted to the practice at a general term of the Supreme Court held in Brooklyn, New York. He once told the writer of this article that he had followed with absorbing interest the Kansas free-state struggle and made up his mind then that if the issue was in favor of freedom, he should move to Kansas and make it his home. It was characteristic of him that he chose Atchison as the place of his settlement, a community where both factions were living in peace and amity, agreeing that past differences should be buried, and that all should work together for the material welfare and advancement of the town. The civic harmony and good will that was in good faith promised by P. T. Abell and B. F. Stringfellow when they declared the truce in Atchison has characterized that thriving city ever since; and to the active efforts and influence of Albert H. Horton as a citizen its subsequent prosperity is in no small measure due. He was twenty-two years old when he reached Atchison. In appearance he was old beyond his years; thin to the point of emaciation, dignified and reserved in bearing, and with the marks of hard study and deep reflection upon his face. A year after his arrival he was appointed city attorney of Atchison by the mayor to fill a vacancy caused by the resignation of the one elected to that office. In the spring following he was regularly elected upon the Republican ticket. In September, 1861, he was appointed district judge of the Second Judicial District

of the state of Kansas by Governor Charles Robinson. He was therefore but little past twenty-three years of age when he took his seat upon the bench of a court of general jurisdiction in a district comprising several counties. That he was equal to the requirements and duties of that important office was proved by his being twice elected to the same position. Before the end of his second term he resigned the office and resumed the practice of his profession. While he sat upon the bench the Civil War was in progress. The editor and publisher of the Atchison Champion, John A. Martin, afterwards governor of the state, was absent in the field with his regiment, the 8th Kansas, and Judge Horton employed his leisure time in assisting in the editing of that newspaper. On the 26th day of May, 1864, he made a journey to Middletown, New York, near his old home, and was married there to Anna Amelia Robertson, daughter of William Wells Robertson and Adeline Sayer. Four children were born of this marriage, all of whom are living. His wife died during the early years of his incumbency on the bench, and some years after he married Mrs. Mary Prescott, of Topeka, Kansas, who still survives him.

In 1868 he was chosen one of the electors on the Republican ticket in Kansas and was selected as the messenger to take the vote of Kansas to Washington to be cast for General U. S. Grant as president.

In May, 1869, President Grant appointed Judge Horton United States District Attorney for Kansas,

which office he held until July, 1873, when he resigned. In November, 1873, he was elected to the House of Representatives of the Legislature of Kansas in the city of Atchison, and in November, 1876, was elected state senator to represent Atchison county. In the latter part of the year 1876, the office of chief-justice of Kansas became vacant by the resignation of the incumbent, Judge Samuel A. Kingman, and Thomas A. Osborn, then governor of Kansas, afterwards United States Minister to Chili and to Brazil, appointed Judge Horton to fill the vacancy. In November, 1878, he was nominated and elected chief-justice for the full term of six years, being the third incumbent to be chosen to that position. He was twice reëlected and remained in office until April 30th, 1895, when he resigned, after eighteen years of continuous service, frankly stating as the reason for his resignation that he found it necessary to enter again the active practice of his profession that he might accumulate means to provide for his family and for his old age. In most of the states of the Union the judicial office is greatly underpaid; in no state more so than in Kansas. That a man of first-rate ability and learning, of great mental energy and unremitting industry should spend himself in the service of the state in its most exalted office for a stipend that afforded himself and his family not much more than a bare living is an ideal example of a rare sense of duty and obligation to the profession of the law and the welfare of the state.

The first opinion which was handed down by Judge Horton as chief-justice was in the case of *State vs. Lofland*.¹ The last opinion rendered by him was in the case of *Beverly vs. Barnitz*.² He wrote the opinion of the court in 1,372 cases. In addition he wrote twenty-two dissenting opinions; fourteen opinions of concurrence, and twenty-nine opinions specially concurring in the judgment of the court, making a total of 1,437.

After his retirement from the bench he became one of the attorneys for the Missouri Pacific Railway system, but also undertook the general practice of the law in which his success was commensurate with his ability and reputation. He had large causes to advocate and was unusually successful in their advocacy.

His health, which had always been delicate, so much so that he sustained his ability to do continuous work only by the most careful and abstemious mode of living, was seriously impaired by an attack of pneumonia, from which he never fully recovered. He died on the 2d day of September, 1902, at his home in the city of Topeka.

It was the call of his Puritan blood that brought him to Kansas and compelled his choice of an abiding place, but he cherished high ambitions as well. Kansas was a new state with a unique history. To a young man of ability, conscious of his powers and with thoughts intent upon the achievement of great-

¹ 17 Kansas Reports, 390.

² 55 Kansas Reports, 451.

ness, there can be no more attractive place to start in life than in a new state in its formative condition. It affords an inspiring and hopeful environment. The domination of wealth, family preferment and social conventions do not exist to chill the ardor and postpone the desires of ambitious youth.

Judge Horton had chosen the law as his profession, and he followed it with that devotion and industry which had already become the habit of his life with reference to all matters of duty. But it was an open secret to those who knew him—indeed, to all the people of the state—that he indulged a persistent and never sleeping desire to make a great public career whereby he might achieve a national reputation. He fell just short of success in this aspiration. He was a candidate for the United States Senate against John J. Ingalls in 1879, and failed by one vote. At another time when he might have successfully made the venture for the same office, one of the wild, eccentric political upheavals that have often occurred in Kansas prevented the essay. He always had a large following of devoted political adherents. They were attached to him not only by political enthusiasm, but by faith and admiration for his character and for his fitness for great public office. It was perhaps the fault of his temperament, if it could be called a fault, that he should revolt at all forms of demagoguery designed to captivate the people and to win their votes. He was not, as the saying is among western people who demand a democratic good fel-

lowship from those who ask their suffrages, "a good mixer." Although at all times readily approachable, there was about him that natural dignity and reserve, which, while it compelled respect, did not invite or inspire that intimate and devoted friendship which makes the fortune of the politician. There is no doubt that he felt a keen sense of disappointment in not achieving his political ambition, although *no one* ever heard him express it in words. He devoted himself all the more assiduously to his duties as judge and has left an indelible impress upon the laws and institutions of Kansas. He exerted a great influence outside his official duties and was resorted to frequently by legislators and other public men in Kansas for advice and counsel in important public matters unrelated to his office. His services were in frequent demand for the delivery of public addresses upon important practical subjects that were under discussion in the state. His reputation as a jurist spread beyond the state. Mr. Justice Brewer, who was his associate for many years upon the bench, was, by reason not only of his recognized ability but on account of influences existing outside the state and at Washington, transferred to the federal bench and put in the way of being chosen to his present exalted station. To those who have studied the careers of both men and are able to measure their comparative stature as lawyers and as judges there is no doubt that if Judge Horton had received the appointment he would have ended his career upon the supreme bench

of the United States; and moreover, would have attained a reputation as a judge not inferior to that of his former associate.

It has been pointed out, times without number, that the career of the greatest lawyer and of the greatest judge leaves no impress, or at least a very evanescent one, upon the lay mind and memory. A few names remain, for reasons for the most part unrelated to their actual work upon the bench or at the bar, like burrs in the public memory, simply because these names have been so continuously exploited by the voice of the profession: Marshall, Kent, Story, Shaw, Webster, and Choate readily occur to the popular memory when the subject of great lawyers is under discussion. But how many lawyers, scarcely inferior in ability and distinguished services to the possessors of these great names, are wholly forgotten; whose fame, if remembered at all, is preserved only in the memories of special students of their profession or in the respective localities where they did their work! How many lawyers can recall off hand the names in their proper order of the justices of the Supreme Court of the United States? One time the writer was sitting in the smoking compartment of a Pullman car in the company of several men of average intelligence, and the name of a famous operatic star was mentioned. One of them remarked in an off hand way that she was the granddaughter of Chief-Justice Story of the Supreme Court of the United States. No one noticed the error involved

in the assertion that Miss Eames was a granddaughter rather than a granddaughter-in-law of the Justice, but some one of the company doubted that Story had been chief-justice. He was soon silenced, however, and satisfied by the confident statement of all present, save myself, who wisely refrained from airing his ignorance in such well-informed company. It was plain, however, from the talk which followed that to the minds of these people the great jurist shone only in the reflected light of the fame of the distinguished lyric artist.

The advocate, however distinguished, is like the actor; he struts his brief hour upon the stage of life and then is heard no more. If he shall go into politics and render distinguished services to the state, he is remembered as a public man and not as a lawyer. Useful and successful legal authorship does not extend his name outside the pale of his profession *nor* beyond the ephemeral life of his book. The judge is in some degree more fortunate. If he shall fortunately be called upon as a member of the court of last resort to write opinions in important causes, he has among lawyers a limited posthumous *fame*. They are able after he has gone, *ex pede herculem*, to take his measure as a man and as a lawyer.

Estimated by this standard, Judge Horton should, as time goes by, take high rank among American judges. The record of his work as a judge is *spread* over thirty-nine volumes of the Kansas reports. It began at a time before the substantive law of Kansas

in many departments of jurisprudence was settled, and numerous important questions involving the interpretation of the constitution of the state had to be determined. Judge Horton's share in this work was both distinguished and able. The court consisted of but three members during the entire period of his incumbency. Any adequate review of the judge's life, therefore, and especially of a judge so devoted and single-minded as Judge Horton, would be inadequate without some reference to the important causes he helped to decide, in which the permanent expression of the court's judgment and the reasons therefor were written by him.

One of the earliest of the opinions written by Judge Horton having an important bearing upon the law of the state was in the case of *Castle vs. Houston*.³ It was the first authoritative exposition of the law of libel in the state and involved the construction of a constitutional provision and the statute enacted in furtherance of it.

It is not surprising that a people that had come through the experience of the early settlers and founders of the Kansas commonwealth should make careful provision in the organic law for the liberty of the press, or, as Judge Horton himself puts it in this case:

The wise framers of our own Constitution, peculiarly acquainted with the beneficial influences of free discussion and a free press, as participants in the historical incidents and conflicts

³ 19 Kansas Reports, 417.

surrounding the settlement of the territory of Kansas, modified the tyrannical and harsh rule of the common law as stated in the star-chamber of England [namely: The greater the truth, the greater the libel] and thereafter generally understood and interpreted, by providing in section 11 of our bill of rights that:

"The liberty of the press shall be inviolate; and all persons may freely speak, write, or publish their sentiments on all subjects, being responsible for the abuse of such right; and in all civil or criminal actions for libel, the truth may be given in evidence to the jury, and if it shall appear that the alleged libelous matter was published for justifiable ends, the accused party shall be acquitted."

The Legislature in reënacting this provision of the Constitution and further to secure the liberty of the press provided that:

In all indictments or prosecutions for libel, the jury, after having received the direction of the court, shall have the right to determine, at their discretion, the law and the fact."

In construing these constitutional and statutory provisions it was held in substance that in all criminal prosecutions for libel the truth of the matter charged as libelous is not a full and complete defense unless it appears that the matters charged were published for a public benefit; or, in other words, for justifiable ends. But in such criminal prosecution, after the direction of the court, the jury shall have the right to determine at their discretion the law and the fact. In civil actions for libel, on the contrary, where the one charged alleges and establishes the truth of the alleged libelous matter, such defendant is legally justified and exempt from all civil re-

sponsibility. And further, he held that in such civil action the jury are not the judges of the law, but must in that respect receive and accept the direction of the court.

This decision was widely commented upon by the press and by the profession in law journals, not only in the state but out of it. It has, however, been in no respect modified or overruled and is the settled construction of the law of libel in the state of Kansas to-day.

The case of *Ryan vs. Leavenworth, Atchison & Northwestern Railroad Company*,⁴ is a comprehensive exposition of the law as to the relations and duties of the directors of corporations and the stockholders, and holds in effect that the directors of the corporation are its primary agents and in dealing with the corporate property act as trustees and are bound to the most scrupulous good faith in their transactions for the corporation and its stockholders. They are not permitted to derive private advantage out of any of their acts concerning the corporation, nor to be pecuniarily interested in contracts which other parties make with the corporation through their influence and direction. It was further held that the stockholders, being *cestuis que trust* of all profits which the directors may derive in handling the affairs of the corporation, may bring suit in their own name and make the recreant directors and the corporation parties, together with all persons whether

⁴ 21 Kansas Reports, 365.

related to the corporation or not, who have participated in the unlawful transactions, parties defendant in an action to compel them to account for their wrongs and frauds, and the corporation itself is a proper party defendant with them. This case is often cited in the opinions of the courts of other states and for the first time in Kansas established a wholesome and salutary rule promotive of honesty and good faith in corporate management.

In the case of *Jones vs. Kellogg*,⁵ it was held that the party in possession of personal property under a claim of right, although such claim was afterwards shown to be untenable, but where the owner of the property had not demanded possession, could maintain an action for its recovery against a stranger who had deprived him of such possession. This decision involved a careful and close review of all the authorities and is a very convincing and satisfactory exposition of the law.

The case of *Missouri Pacific Railroad Company vs. Sharitt*,⁶ involved a vexatious abuse of legal process by creditors of railroad employes and in which the majority of the Supreme Court of Kansas had given a decision more largely inspired by sympathy for these employes than by a strict regard for legal precedents. The Railroad Company had been garnisheed, in Kansas and Missouri, in a suit against one of its employes. The wages of the employe

⁵ 51 Kansas Reports, 263.

⁶ 43 Kansas Reports, 387.

were exempt under the laws of both states, but he had not appeared to the action in Missouri and service had been had upon him by publication. Thereupon the railroad company, being bound as garnishee in Missouri, refused to pay the employe his wages, and he sued the company in the Kansas courts. The majority of the Supreme Court held that he could recover and that the pendency of the proceeding in Missouri was no defense to the action. Judge Horton dissented in a lengthy opinion. Another case involving the same proposition and controlled by the same decision was afterwards taken to the Supreme Court of the United States and the court by unanimous decision upheld the dissent of Judge Horton.

One of the most important of Judge Horton's decisions is the case of *State vs. Stormont*.⁷ It had been mooted that the admission of Kansas in 1861 under the constitution of 1859 had abrogated and superseded the territorial acts in contravention to such constitution and particularly special acts of the territorial Legislature creating and chartering corporations. In summing up the matter Judge Horton said:

Our conclusions upon the foregoing matters are, that the Kansas Medical Society was lawfully chartered by the territorial legislature; that it was legally endowed with perpetual succession; that the constitution did not suspend or repeal its charter; that if the state legislature has the power to suspend or repeal the charter, which we do not decide, it has never exercised, or attempted to

⁷ 24 Kansas Reports, 686.

exercise, the power, and that society is a lawfully existing corporation.

A great variety of questions will be found discussed in the large number of opinions of Judge Horton. Although in the main they evince a tendency to conservatism and manifest a great tenderness for the settled rules of the law and an inhospitality to new and revolutionary ideas, nevertheless a large number of instances could be found in Judge Horton's opinions where in cases of first impression in Kansas and conflicting currents of authority he has chosen the side least buttressed by precedents. But he has always been at great pains to give his reasons for his selected view of the law, and in every instance that we can recall his determination in that respect has been satisfactory and sound. Every page of his legal authorship is fraught with a sense of his duty to the law, no less than a disposition to accomplish ethical righteousness in the abstract and unrelated sense in the case in hand. He seemed to desire to satisfy fully his own reason and sense of justice, but at the same time to uphold the letter of the law as he found it. The court as it was constituted when he entered it, and as it so continued for many years thereafter was not only an industrious but a harmonious one.

The impression that Judge Horton made upon all the rulings of the court was patent to those who practiced at its bar, and it therefore may be said that he had a larger influence upon the growth of the com-

mon law in Kansas and the establishment of its permanent rules than any man in its judicial history. In popular esteem, however, one of the most important decisions ever made during his incumbency in which he prepared and delivered the opinion of the court is the case of "*In re Gunn*," to be found in the 50th volume of the Kansas Reports.⁸ It marked the ending of one of the most exciting political episodes that ever occurred in Kansas. It was the final triumph of the law and of the authority of the judiciary in a conflict which almost ended in a bloody insurrection. I refer, of course, to the populist uprising of 1890-1. A brief narration of the events leading up to this decision is necessary to the understanding of its significance and importance in the judicial history of the state. An era of speculative enterprises, especially in the purchase and sale of farm lands and town lots, commonly called a "boom," had been in progress in Kansas for something over three years. After running a wild course the boom had collapsed. Hot winds and drought, which periodically disappoint the hopes of the farmer in the western states, had aided in producing almost universal financial reverses among the people of the state and particularly among the farmers. The field lay fallow for the agitator and demagogue. Without doubt there were many just causes of complaint against the railroads and there was a laxity in the political morals of legislators and other officers. But as the result

⁸ Page 155.

of intemperate agitation the whole blame for the lack of the early and the later rain, for crop failures, and the disasters of frenzied speculation was heaped upon the government and those holding responsible public offices. An organization, social and economic in its purposes was first formed, called the Farmers' Alliance, out of which grew the so-called People's or Populist party, whose leading tenet consisted in a repudiation of both of the old political parties, and all their works, of all men who had been honored and trusted and publicly preferred and the substitution therefor of the rule of what was called the "plain, common people." Like Jack Cade, they laid most of their misfortunes to the lawyers, and though they did not propose like that famous revolutionist "first of all to kill them," they voted a lack of confidence in them and proposed to make laws for themselves, to interpret them in their own way and as fast as vacancies occurred to put farmers even into the judicial offices. They finally succeeded in electing a governor and all the state officers, but failed to secure a majority in the lower house of the Legislature.

Upon the assembling of that body the minority endeavored to perpetrate a scheme to give them possession of the organization, notwithstanding the fact that the records of the board of state canvassers and the roll of the certificated members made up from it showed conclusively that the majority of certificated members were not Populists. A number of purely fictitious notices of contests had been filed with the

secretary of state. The statute provided for the secretary of state laying the roll of the certificated members before the respective bodies of the Legislature. The custom had been for him to read their names. Instead of doing this he deposited a paper and left the room, and thereupon a certified copy of the roll obtained by the Republicans was presented to the House, and both sides simultaneously sought to organize. In point of time the Republican organization was a little in advance of the populist organization. There was a great deal of confusion naturally, and at the end there were two speakers upon the rostrum claiming the attention of the House and two secretaries calling the rolls. A protracted struggle followed, one of the episodes of which was the closing of the doors of the House against the Republican members, followed by their coming in procession, with their speaker at their head, who broke down the barriers with a sledge hammer and entered, the Populists leaving them in possession. Thereupon the governor called out the militia, which he had previously subjected to a sort of Pride's purge by suspending most of its officers and putting others in their places, who surrounded the statehouse and awaited the governor's orders. Food was supplied to the members from the outside, and a sort of martial law was established over the statehouse and no one allowed to enter without a pass issued by the governor. Before the arrival of the militia, however, a large number of deputy sergeants-at-arms

had been sworn in and armed, and were occupying the representatives' chamber with the Republican members. Thereupon, the sheriff of the county, in sympathy with the Republicans, swore in several hundred deputy sheriffs to preserve order, with the result that a cordon of resolute men armed with Winchesters was placed around the militia outside the statehouse grounds. The commander of the militia refused to obey the orders of the governor to expel the members from the House and was deposed from office and another put in his place. In this attitude of mutual menace they remained for two or three days, the governor being unyielding to the demand to permit the courts to settle the question, insisting that the courts had no jurisdiction of it, until the patience of those supporting the certificated members of the House was about exhausted and a movement was decided upon which would have resulted beyond doubt in fearful bloodshed, when the governor late one night weakened, agreed to a truce, the terms of which were that the Republicans or Douglass House should retain possession of the representative chamber and the Populists or Dunsmore House agreed to find other quarters outside of the capitol building. This agreement was afterwards modified so as to allow the Dunsmore House to sit in the basement of the capitol.

How to get the matter in form to be presented to the court for adjudication still continued to be an apparently insoluble problem. Several contests had

been filed and the Douglass House assumed the jurisdiction of them and issued subpoenas for witnesses. One of these witnesses was a man by the name of Gunn, who, although a Populist, was honestly desirous of having the question settled, believing, of course, in the ultimate triumph of his party. The Populists endeavored to induce him to come without objection and not to raise the question of the legitimacy of the body which had summoned him. But he was proof against both threats and blandishments. He refused to recognize the subpoena, was attached for contempt of the process of the Douglass House, and sued out a writ of *habeas corpus* before the Supreme Court, and in that way the whole question was brought to the court's attention and determination.

It is necessary to state that after the organization of the Dunsmore or Populist House, the Senate, which had a majority of Populists, and the governor, recognized it as the *de jure* organization and refused to recognize the Douglass House. The situation was nearly analogous to that which had once been brought about by similar factional disputes in the state of Maine a few years before. The opinion of the court was handed down by Judge Horton, and it is not too much to say that this question which lies at the foundation of civil society under our constitutional form, was never more ably, satisfactorily, or conclusively handled than by Judge Horton in this case.

After disposing of the preliminary questions as to the jurisdiction of the court in *habeas corpus* to try to determine such an issue, he proceeded to the discussion of the two important questions in the case; namely, first, that the certificated members had a right to participate in the preliminary organization, and the correlative proposition that none but certificated members had such right. It appeared that the Dunsmore House had prepared a roll of members which omitted the names of enough certificated members to give the Populists a majority, and substituted for them the names of those who had filed contests, and this was done before the organization of the House and before contests had been presented to the House and properly referred to committee. Judge Horton in the course of his opinion, said:

It may seem plausible, without full consideration, to say that only those members of the Legislature who are actually elected, whether having certificates or not, are the persons that should organize either house. But some method of organization is necessary; some written evidence of title must be created or exhibited before any person can be regarded as having a *prima facie* right to a seat in the Legislature. Those persons having certificates, and only those, must be permitted to organize, and no authority can change or overthrow that right of *prima facie* written evidence of title of a member except the House itself; and the members of the House cannot be regarded as a legal or constitutional House until there is some temporary or permanent organization by a majority thereof; that is, by 63 members having certificates of election. The certificates of election give a title to the members holding the same, which must govern their associates until there

can be an adjudication by the House itself to the contrary; that is, by a constitutional house having a quorum.

And then, in a masterly review of the facts of the case, he disposes of all of the sophistical arguments offered in support of the Dunsmore House, and concluded by deciding that the Douglass organization was a valid one and was the real House of Representatives of Kansas. There remained, however, to decide the pivotal question of the law; viz.: Granting that it might be established as a matter both of fact and law that the Douglass House was the legitimate house, yet the Dunsmore House was a *de facto* organization that was recognized by the other branches of the Government, and that the Supreme Court was without jurisdiction under the constitution to question its regularity and legitimacy as a legislative body. But this was met, and satisfactorily and conclusively met by Judge Horton as follows:

It is asserted that the court cannot inquire by *quo warranto* into the right of membership of these respective bodies. This court so ruled in the Tomlinson case, in 20 Kan. 692; but when this court has the ultimate right and duty to pass upon acts of the Legislature, it has also the right to pass upon the organization of the Legislature, of either or both houses, although it has no right whatever after the Legislature is organized to deal with any question concerning "the election, returns and qualifications of its own members." Clearly, it has, in any event, the right to pass upon the powers of a house—only a part of a legislature. This proceeding is not a collateral attack, but a direct attack on the Douglass House.⁹ Necessarily involved is the status of the Dunsmore House.

⁹ Citing, Vase vs. Morton, 4 Cushing's Reports, 31.

And the court goes on to say that whether **Gunn** is rightfully restrained of liberty by a legal house of representatives is not a political, but a judicial question, and there follows that the authority **exists** to inquire and determine whether the house has **been** properly organized and is such a house as is **author-**ized by the constitution of the state of Kansas, to establish its own rules and to keep and publish a journal, etc.

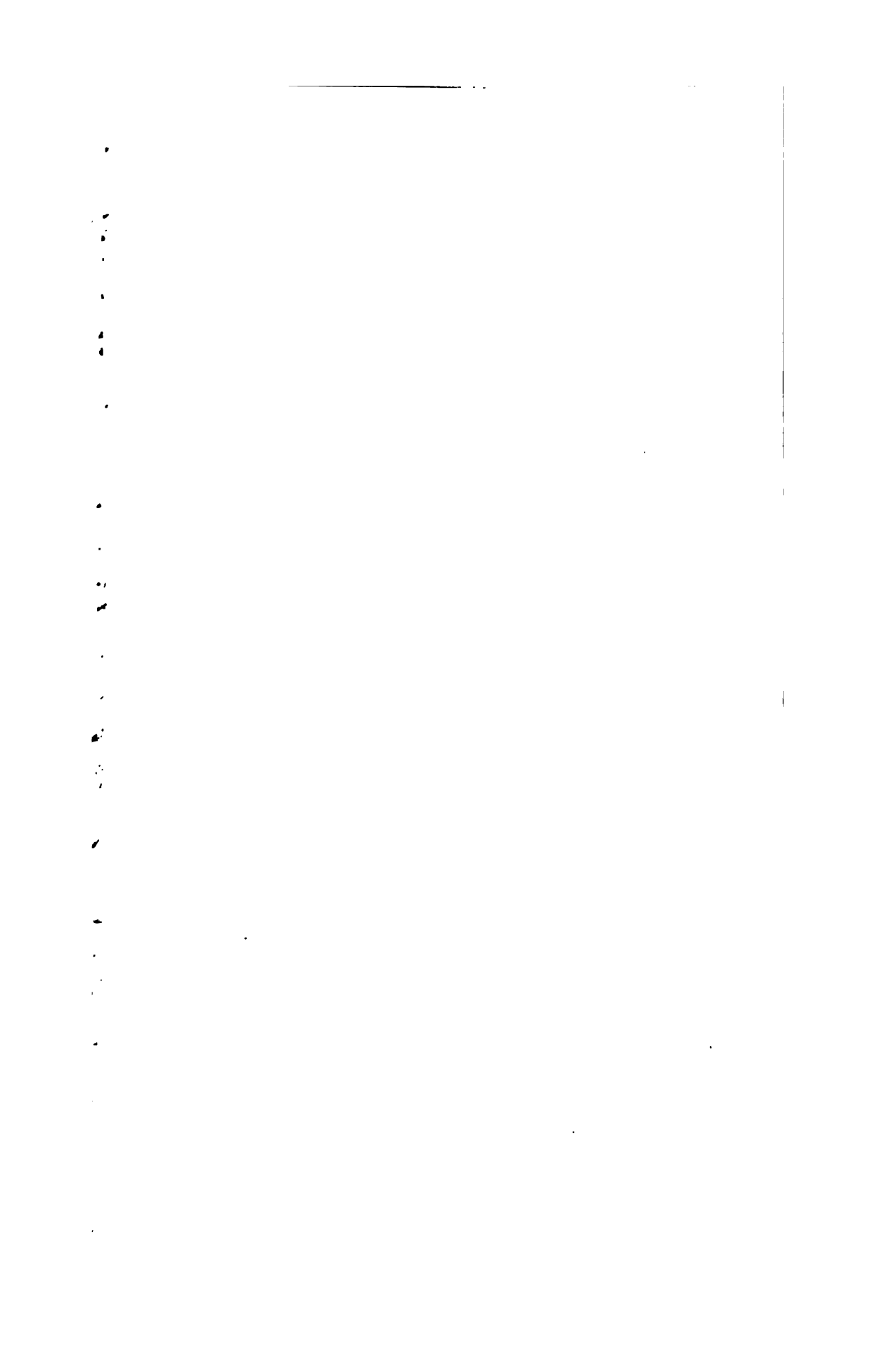
There is one passage in this opinion that is peculiarly characteristic of Judge Horton. In an exalted strain suited to the gravity of the occasion, he illustrates the true ideal, not only of judicial courage, but of judicial sincerity in meeting such emergencies. We quote:

The questions involved in this case are above partisanship. They concern the public; they concern the state; and party and partisanship should be wholly disregarded by each and by all. Let the mistakes of the past be corrected, and the unfortunate differences pass without further comment into oblivion. Let mutual concessions prevail, and then, perhaps, amicable relations between the belligerent and discordant elements may be restored. "He serves his party best who serves his country most." The gravity of the subject we fully understand. Certainly no constitutional or public question can be more solemn than that arising from the present contention respecting the organization of the house of representatives. While we deplore the occasion which compels us to hear and determine this case, we feel constrained by the imperative command of the Constitution,, and by our own conscientious discharge of public duty, to declare these views, irrespective of policy or expediency. Entertaining the views we do, we cannot consent to rob the highest judicial tribunal of this

state of its constitutional rights; nor can we consent to exalt the executive or the senate of the state above the demands of justice, of safety, or the welfare of the people.

In the foregoing sentences are embodied the conscientious spirit and consecration to duty which actuated and controlled Judge Horton through life. As we have intimated, his career was not wholly satisfactory to himself. He had suffered great disappointments, but had borne them manfully and without complaint. He worked without ceasing at the law and his labors spared him little time for social relaxation. He lived and died a man of moderate fortune; by the standards of the day, a poor man. Was his life successful? This question is the modern touchstone whereby lives are tested, marked with approval, or contemptuously dismissed. The answer depends upon the standard whereby success shall be measured. The epigram of Rufus Choate did not fully apply to him. He certainly "worked hard," but he did not "live well," according to the meaning of the maxim, for his labors left him little time for social enjoyment, and his health forbade him convivial habits or the pleasures of the table. And according to the way gear is measured in these days, he certainly "died poor."

But if to fill worthily and usefully the most exalted judicial office in his state for many years; to leave a large and indelible impress upon her civil institutions and upon the body of the common law; to meet every duty and perform it courageously and well and





G. L. Simpson

CHRISTOPHER COLUMBUS LANGDELL.

1826-1906.

BY

JAMES BARR AMES,

Dean of the Harvard Law School.

CHRISTOPHER COLUMBUS LANGDELL was one of the many sons of New Hampshire who won their distinction away from their native state. He was born in the small farming town of New Boston, May 22d, 1826. William Langdell, his great-grandfather, came, in the first half of the eighteenth century, from England to Beverly, Massachusetts, and removed to New Boston in 1771, being one of the early settlers of that town. John Langdell, one of William's five sons, remained in Beverly, marrying, in 1789, Margaret Goldsmith; but after his death his widow, a vigorous and interesting personality, who lived to be a centenarian, made her home in New Boston, where her only son, John, the father of Christopher, spent his life. The great-grandfather, grandfather and father were all farmers. His ancestry on the maternal side was Scotch-Irish. His great-grandfather, Andrew Beard, with his wife, Lydia Goardly, who excelled in the manufacture of linen cloth, and his four-year-

old son Joseph, were in one of five shiploads of emigrants that came together to this country from the north of Ireland, in 1766. After living for a few years at Litchfield, he settled in New Boston. Joseph Beard's daughter, Lydia, became the wife of John Langdell, and the mother of Christopher.

It was from his mother's family that Langdell inherited his intellectual gifts. The Beards were generally good scholars, and many of them were teachers. His sister taught before her marriage and has been a book-lover all her life. His uncle, Jesse Beard, was a remarkably successful teacher. His great-uncle William was an officer in the Revolutionary War, who declined the pension to which he was entitled. His cousin, Alanson Beard, was a Republican leader in Massachusetts, and at one time collector of the port of Boston.

It was Langdell's very great misfortune to lose his mother when he was only seven years old. Three years later his home was broken up and thereafter Langdell lived in different families, working in the summer and going to the district school in the winter.

He was not precocious, but studious and ambitious, winning the confidence and approval of his teachers. One of them was wont, if called out of the school-room, to leave Christopher in charge of the pupils. It was probably this teacher who made him a present of a new Latin dictionary on the condition that no student was to know who gave it to him.

When he was sixteen, his sister Hannah, two years his senior, who had been for six years in Massachusetts, and whose constant wish was that "he might have a liberal education and become a distinguished man," made a visit to New Boston. "He came to see me there," she writes, "and there opened his heart to me for the first time, and it was also the first time he had made known his aspirations to any human being. He told me that he had a very strong desire for a college education, but did not see how it could be accomplished." His sister encouraged him to make a beginning and to believe that a way would be opened. She promised to help him so far as she could.

He taught his first school the following winter at Wilton, New Hampshire. In 1844 he worked for several months in one of the Manchester mills.¹

The venerable John Cross, of Manchester, who was then just starting in practice, recalls with pleasure an interview with Langdell, who called in the same year to ask if it were possible to realize his dream of going to college. The young lawyer encouraged him to try to work his way through Exeter,

¹ Sixty years, it should be remembered, have made a great change in the quality of the mill-hand. Two generations ago many sons and daughters of farmers and others of moderate means spent a year or so in a mill before settling down to the work of life, or marrying. At Lowell, in 1850, those employed in the mills published a magazine called "The Lowell Offering." In this magazine first appeared several of the poems of Lucy Larcom, who with her sister was a mill-hand.

telling him that if he succeeded in this he could probably do the same at Cambridge. He acted on this advice, entering Exeter in the spring of 1845. He hoped to get upon the foundation, that is, to receive one of the scholarships awarded in July. But this hope was not gratified. His failure to win a scholarship, coming as it did after he had given a part of his hard-earned money to help his father, was probably the keenest disappointment of his life. Almost heart-broken, he sat down upon the steps of the Academy building and burst into tears. But in spite of this blow he did not waver in his purpose. He remained at the Academy, being employed to ring the Academy bell, and in other work. His sister Hannah sent him occasionally small sums of money out of her earnings, saying to herself each time as she dropped the letter into the box, "This is the happiest day of my life." His younger sister, Mary, who died in 1850, at the age of seventeen, also made him small gifts. It is quite possible that, without the encouragement and touching devotion of his sisters, each of whom, like himself, worked for a time in a mill, he might not have realized his ambition for a college education. His abilities were discovered by the teachers, and the next July he won a scholarship which he held until he left Exeter in the summer of 1848. His rank rose each year. His "improvement" in the last year was marked "distinguished."

He was older than his schoolmates, and he had neither the time nor inclination to engage in their

sports. But he had their thorough respect and liking. In 1847 he was elected president of the Golden Branch, the literary society of the Academy. To the end of his life he retained vivid recollections of his life at Exeter, and a strong interest in the place and the school. Being asked in later life what it was that he felt he owed to Exeter, he said: "I was a boy. I had lived on a farm and as a mill hand at Manchester. I went to Exeter—," and then after a pause added, with much feeling, "Exeter was to me the dawn of the intellectual life."

From Exeter he went to Harvard college, entering the class of 1851 as a fresh-sophomore. At the end of the year he ranked second in his class. His recitations made a strong impression upon his classmates, and it was the general opinion that, if he completed the course, he would lead the class. In September, 1849, the faculty assigned him a junior exhibition part, a Greek version, but afterwards excused him from performing it "on account of his delicate health." Early in December he, with twenty-five of his classmates, was granted leave of absence for the remainder of the term for the purpose of teaching school. Langdell did not return to college, partly for pecuniary reasons, and partly because he thought he was not getting enough out of his college life to make it worth while to delay longer the beginning of his legal training. After acting as a private tutor for a few months in Dover, he went back to Exeter and studied law for eighteen months in the office of

Messrs. Stickney and Tuck. He was still working his way. One of his Exeter contemporaries writes:

One noon when we returned from the Academy, a young man was sawing wood in the back yard, and was at the same time reading a law book that lay upon a pile of wood before him. That was Langdell.

November 6th, 1851, he entered the Harvard Law School. Although the course was then only a year and a-half, he remained at the school for three years, being, during the greater part of the time, librarian as well as student. His exceptional ability was recognized alike by the professors and by his fellow-students.

He was engaged by Professor Parsons to assist him in the preparation of his work on Contracts, and contributed many of the most valuable notes in that widely-used book. His eyes were not strong, and the brightest men in the school were eager for the privilege of reading law to him for the sake of hearing his suggestions and comments upon the opinion of the judge or the statements of the writer. At commencement in 1854, when his college classmates, according to the practice of that day, received their degree of A. M., simply because they had lived three years after graduation, Langdell, although not a bachelor of arts, received the distinction of an A. M. *honoris causa*.

Judge Charles E. Phelps, of Baltimore, who was in the law school with him, gives this reminiscence of Langdell:

He always wore a green lined dark shade. Under his auspices there were a dozen of us who clubbed together. There I saw his "case system" in the making, although at the time I did not realize it. Over our sausage and buckwheat, or whatever it was, we talked shop, nothing but shop, discussed concrete cases, real or hypothetical, criticised or justified decisions, affirmed or reversed judgments. From these table-talks I got more stimulus, more inspiration, in fact, more law, than from the lectures of Judge Parker and Professor Parsons.

Judge Phelps alludes also to his "almost fanatical and somewhat contagious enthusiasm as a student," which is illustrated by a story of another of his contemporaries in the school, who found him one day in one of the alcoves of Dane Hall absorbed in a black-letter folio, doubtless a year-book. As he drew near, Langdell looked up and said, in a tone of mingled exhilaration and regret, and with an emphatic gesture, "Oh, if only I could have lived in the time of the Plantagenets!" He roomed in Divinity Hall, but he was so constantly in the law library and so late at night, that some of the students used waggishly to say that he slept on the library table.

Certainly his three years at the law school were very happy years. He was realizing to the full the joy of the intellectual life. He had ample opportunity to seek the sources. Before long, as one of his friends writes, through his editorial work for Professor Parsons, the wolf was driven from his door never to return. The quality of his fellow law students was exceptionally high. Among them were James C. Carter, the three Choate brothers, Charles,

William and Joseph, James B. Thayer, George O. Shattuck, A. S. Hill, Alfred Russell, Arthur M. Machen, Addison Brown and Charles E. Phelps. He saw much of Theodore Tebbetts, who was in the Divinity School, and of Charles W. Eliot and John P. Allison, who were undergraduates. A strong friendship sprang up, in 1854, between him and the attractive William Gibbons, whose promising career was cut short by his untimely death the following year. In a letter to William, his father, James G. Gibbons, says:

I hope thee may be fortunate enough to secure Langdell's entire respect; but there's only one way to do it, I know, from the character of the man; and that is by conscientious devotion to duty. The acquaintance and confidence of one such person is worth that of fifty common men.

In December, 1854, Langdell left the law school and began practice in New York City, where he remained until 1870. For several years he was alone. His first important case, a Massachusetts case, turning upon the construction of a will, was given to him in the spring of 1856 by his Exeter and college friend, Joseph G. Webster. He argued the case in November, 1858, and won it in August, 1859.² He spent much of his time in the library of the New York Law Institute. The librarian being asked one day by Charles O'Connor where to look for the law on a certain question, pointed to Langdell and said: "That young man knows more about the law on such

² Kuhn vs. Webster, 12 Gray's Reports, 3.

a matter than anyone else." After this the young man assisted Mr. O'Connor in several important cases, notably in the celebrated Parish will case in 1857. In June, 1858, he wrote that he had been driven to death by another heavy will case for which he prepared a long written argument. Mr. O'Connor used frequently to say that Langdell was the best-read lawyer in New York, an opinion entertained by James C. Carter and other competent judges. In the summer of 1858 he formed a partnership with William Stanley, who was then practicing by himself, his former partner, Edwards Pierrepont, having become a judge. The new partnership came about in this way. Mr. Stanley had occasion to consult Langdell at the law institute upon a very important case, and received from him so much valuable legal information that he made a proposition to him to become his partner. The proposition must have been a very good one, for Langdell wrote to a friend:

My new business arrangement promises very finely in a pecuniary point of view. We have just as much business as we can do; though, I suppose, we should do more, if we had it.

In November, 1860, Judge Pierrepont resigned his judgeship and became senior partner in the firm of Pierrepont, Stanley and Langdell. This partnership was dissolved in 1864, and succeeded by the partnership of Stanley, Langdell and Brown, the junior partner being Addison Brown, later United States district judge. Langdell did not often appear in court, and, leading a secluded life, was not gener-

ally known even by lawyers; but by those with whom he came in contact he was recognized as an invaluable ally, and a very formidable antagonist in any controversy turning upon points of law. A narrow winding staircase led from the office of his firm to a room above, which was his private office, and adjoining it was his bedroom. In the almost inaccessible retirement of this office, and in the library of the law institute, he did the greater part of his work. He went little into company. He was a dear friend of the family of his partner, Stanley, and his friendship with William Gibbons gave him so cordial a welcome from his friend's father and mother and sisters, that he passed many evenings and Sundays with that hospitable, cultivated, and attractive family. At one time during his calls, the young ladies read Dickens aloud, and were surprised to find that when any place in or near London was mentioned, Langdell could tell them just where it was and all about it, although he had never been in England. This incident is a typical instance of the painstaking thoroughness with which he explored any subject that interested him, and of his vividly tenacious memory.

How he came to be Dane Professor, January 6th, 1870, is best told in President Eliot's words:

I remembered that when I was a junior in college, in the year 1851-1852, and used to go often in the early evening to the room of a friend who was in the Divinity School, I there heard a young man who was making the notes to "Parsons on

Contracts" talk about law. He was generally eating his supper at the time, standing in front of the fire and eating with a good appetite a bowl of brown bread and milk. I was a mere boy, only eighteen years old; but it was given me to understand that I was listening to a man of genius. In the year 1870 I recalled the remarkable quality of that young man's exposition, sought him in New York, and induced him to become Dane Professor.

The characteristic independence of the man and his determination to win only by sheer force of merit are indicated by his attitude during the interval between his interview with the President and his election by the Corporation and Overseers. He was so little known by the members of the governing boards that he was asked to give the names of some New York lawyers who were in a position to answer inquiries as to his qualifications for a law professor. He could not see his way to comply with their request. Pending the confirmation by the Overseers of his nomination by the Corporation, he was invited to meet a number of the Overseers at dinner. This invitation was also declined. He was unwilling to take a single step to influence his own election.

In September, 1870, he was appointed to the new office of dean of the law school, and held this position for twenty-five years. He continued his lectures as Dane professor for five years longer. He became professor emeritus in 1900, and up to the time of his death, July 6th, 1906, devoted himself to writing.

September 22d, 1880, he was married, at Coldwater, Michigan, to Margaret Ellen Huson who survived him. He left no children.

Langdell was a successful practitioner in New York; but his fame rests wholly on his threefold work in Cambridge, as a writer, as the reorganizer and administrator of the law school, and as the originator as well as exponent of a new method of legal education.

The successful assistant of Professor Parsons might have been expected to produce, early in his professional career, a treatise wholly his own. But Langdell seems not to have had the ambition for legal authorship by itself. His collection, "Select Cases on Contracts," appeared in instalments during the academic year 1870-1871, the completed volume being published in October, 1871, with a short summary of thirteen pages, an admirable specimen of terse and accurate generalization. The following May he published his "Select Cases on Sales of Personal Property," with a summary of twenty pages described by Judge Holmes as "unpretentious but masterly." In 1873 he began to print in instalments his "Cases on Equity Pleading," and two years later completed the book together with a summary of 120 pages. In 1877 this summary was issued separately. In his second edition of "Cases on Contracts," published in 1879, the summary was nearly as long as the summary of Equity Pleading, and a year later was issued as a separate book, a second edition of which was published in 1883.

In 1879 he began to teach the subject of equity jurisdiction and, accordingly, during that year

printed the first three parts of his "Cases on Equity Jurisdiction," to which he added two parts in 1883. He never made a summary of this incomplete collection, and abandoned its use in 1890. He preferred to give his attention to other branches of equity jurisdiction, basing his teaching, however, not upon a printed collection of cases, but upon a mere list of cases.

During the last twenty years of his life he wrote for the Harvard Law Review a considerable number of articles upon various heads of equity jurisdiction, but with no thought of making a book upon that subject. By his sufferance rather than with his encouragement, the Harvard Law Review, in 1905, published these essays in a volume, "A Brief Survey of Equity Jurisdiction."³

³ After the publication of this volume, five additional articles upon Equitable Conversion appeared in Harvard Law Review, vol. XVIII, 1, 83, 245, and *Ibid.*, vol. XIX, 1, 79, 233, 321. These articles, together with an index and a table of cases cited, are included in a new edition of the book now in press.

Besides the "Brief Survey" Langdell wrote for the same Review the following articles: *Discovery Under the Judicature Acts of 1873, 1875 (1879-98)*, Harvard Law Review, vol. XI, 137, 205, *Ibid.*, vol. XII, 151; in the nature of a supplement to his Summary of Equity Pleading. *Mutual Promises as a Consideration for Each Other* (1901), *Ibid.*, vol. XIV, 496; a defense of a doctrine set forth in his Summary of Contracts. *Patent Rights and Copyrights* (1899), *Ibid.*, vol. XII, 533; a short extract from a lecture to his class. *The Status of Our New Territories* (1899), *Ibid.*, vol. XII, 365. *The Northern Securities Case and the Sherman Anti-Trust Act* (1903), *Ibid.*, vol. XVI, 553. *The Northern Securities Case Under a New Aspect* (1903), *Ibid.*, vol. XVII, 41. *Dominant Opinions in England During the Nineteenth Century in Relation to Legislation, as Illustrated by English Legislation, or the Absence of It, During that Period* (1906), *Ibid.*, vol. XIX, 151.

From this account of his writings it is plain that nothing was farther from Langdell's mind than the production of a *magnum opus*. His three treatises were in a measure forced from him as the natural outcome of the class-room discussions of his collections of cases. In the preface to the second edition of his *Cases on Contracts*, he said of the summary at the end of the volume:

The object of it has been to develop fully all the important principles involved in the cases, and to that object its scope has been strictly limited.

The same was true of his *Summary of Sales* and, to a large extent, also of his *Treatise upon Equity Pleading* and his *Brief Survey of Equity Jurisdiction*. His *Cases on Contracts and Sales*, and his course upon *Equity Jurisdiction* being fragmentary,⁴ his treatises upon those subjects are also fragmentary. But each of them is a solid contribution to the law.

In his analysis of contracts he emphasized the distinction between unilateral and bilateral contracts, and these terms, which, essential as they are to correct legal thinking, were hardly to be found in any of our law books a generation ago, are now thoroughly domiciled in our legal terminology. There was an-

⁴ Langdell certainly intended at one time to complete his collection of *Cases on Contracts*, and probably expected to add another volume to the *Cases on Sales*. But the teaching of other objects monopolized his time, and he willingly relinquished these subjects to his pupil and colleague, Professor Williston. One cannot but regret that the pioneer "Case Books" should be permanently shelved, but the life of a case-book is necessarily short. Moreover, much of Langdell's work still lives in Williston's "*Cases on Contracts*" and "*Cases on Sales*."

other distinct advance in the law of contracts when he made detriment, incurred by the promisee at the request of the promisor, the universal test of a consideration. Sir Frederick Pollock in an appreciative review of the "Brief Survey," refers to the distinction established by the author between bills for an account proper and bills based upon an "Equitable Assumpsit" as "a brilliant example of Professor Langdell's method." Hardly less brilliant is his statement that the so-called doctrine of specific performance of contracts is a misnomer in the case of affirmative contracts, since equity in such cases enforces not the specific performance of the contract, but specific reparation for its breach. No one who wishes to wrestle with the fundamental conceptions of law can afford to overlook Langdell's Classification of Rights and Wrongs, or fail to profit greatly by his substitution of the terms absolute and relative rights for rights *in rem* and rights *in personam*.

To a legal expert the summary of Equity Pleading, the only one of his treatises that covers its subject, is the best exhibition of the author's great powers of historic insight, acute analysis, original, sagacious generalization and vigorous terse expression. His derivation of the system of equity pleading from the ecclesiastical system, with borrowings from the common law practice, is as convincing as it is fascinating, and, read in connection with the English cases upon equity pleading, demonstrates the practical importance of a knowledge of legal history by those

who are administering the law. Had the English equity judges of the seventeenth and eighteenth centuries been familiar with the historical development of equity pleading, as described by Langdell, suitors would have been saved from a mass of costly litigation, and the reports would not have been encumbered with what must be considered the least creditable judgments in the history of English equity. The part of this classical treatise which is likely to have the most far-reaching influence, is the chapter dealing with the nature of equity jurisdiction. It is an ancient maxim that equity acts *in personam*. But to Langdell belongs the credit of emphasizing, as no other writer has emphasized, the importance of this maxim, and of asserting that the power of the chancellor, as representative of the sovereign, to compel the defendant to do what he ought to do and to refrain from doing what he ought not to do, is the key to the whole system of equity. This conception has dominated all his writing and teaching of equity.

His essays upon "The Status of Our New Territories," and upon the Northern Securities Case indicate his active interest in, and his ability to deal with the legal aspects of large public questions. The general reader will find an admirable illustration of the quality of his mind in his review of Dicey's *Law and Public Opinion*, a review all the more remarkable when it is remembered that the reviewer was in his eightieth year.

Langdell's chief ambition and his greatest achieve-

ment was the reorganization and development of the Harvard Law School. He wished to see it a great school in a great university. He believed that this wish might be gratified because of his conviction, formed in his student days, that law is a science and that all the available materials of that science are contained in printed books. These two principles explain the chief changes in the school introduced during his administration. He sought to improve the quality of the students, to increase the amount of their work and to enlarge their opportunities. He found at Cambridge a school without examination for admission, or for the degree, a faculty of three professors giving but ten lectures a week to 115 students of whom 53 per cent had no college degree, a curriculum without any rational sequence of subjects, and an inadequate and decaying library. He lived to see a faculty of ten professors, eight of them his former pupils, giving more than fifty lectures a week to over 750 students, all but nine being college graduates, and conferring the degree after three years' residence and the passing of three annual examinations. At the beginning of his professorship, the treasurer's books disclosed a deficit. At the time of his death the surplus was nearly half a million dollars, large enough to provide a library fund of \$100,000, and an additional building with ampler accommodations than those of Austin Hall, to be named, with peculiar fitness, Langdell Hall. Of the 99,000 volumes now in the library, 90,000 have been added since 1870,

and the collection, if regard be had to the number, editions and physical condition of the books, is believed to be without a rival. Truly his high ambition for the school was abundantly gratified. It is no disparagement of his great services, and it is right to add, that his wonderful success would have been impossible without the sympathetic and unswerving support of President Eliot.

A novel departure of the new administration was the appointment to the teaching staff of a young graduate of the school who had had no office experience. Long afterwards, in 1886, in an address at the dinner of the Harvard Law School Association, Langdell gave his reasons for recommending so striking a novelty:

I wish to emphasize the fact that a teacher of law should be a person who accompanies his pupils on a road which is new to them, but with which he is well acquainted from having often traveled it before. What qualifies a person, therefore, to teach law is not experience in the work of a lawyer's office, not experience in dealing with men, not experience in the trial or argument of causes,—not experience, in short, in using law, but experience in learning law; not the experience of the Roman advocate or of the Roman prætor, still less of the Roman procurator, but the experience of the jurisconsult.

In the Harvard Law School the exception has become the rule. A majority of the professors now in its faculty were appointed soon after receiving their degree in law. The precedent introduced by Langdell, has been followed in so many law schools, that he may be said to have created a new and attractive

career for able young lawyers with a taste for the academic life.

But the most startling and most fruitful of the changes introduced by Langdell was the innovation in the mode of teaching and studying law. The lawyer bases his brief, and the judge his opinion, not upon treatises but upon a careful study of the reports of decided cases. Langdell maintained that the law student should pursue this same method; and that collections of cases upon the different branches of the law, arranged systematically and in such order as to exhibit the growth and development of legal doctrines should be analyzed and discussed by pupil and teacher in the class-room. He wrote in the preface to his *Cases on Contracts*:

Law, considered as a science, consists of certain principles or doctrines. To have such a mastery of these as to be able to apply them with constant facility and certainty to the ever-tangled skein of human affairs, is what constitutes a true lawyer; and hence to acquire that mastery should be the business of every earnest student of law. Each of these doctrines has arrived at its present state by slow degrees; in other words, it is a growth, extending in many cases through centuries. This growth is to be traced in the main through a series of cases; and much the shortest and best, if not the only way of mastering the doctrine effectually is by studying the cases in which it is embodied. But the cases which are useful and necessary for this purpose at the present day bear an exceedingly small proportion to all that have been reported. The vast majority are useless, and worse than useless, for any purpose of systematic study. . . . It seemed to me, therefore, to be possible to take such a branch of the law as *Contracts*, for example, and, without exceeding com-

paratively moderate limits, to select, classify, and arrange all the cases which had contributed in any important degree to the growth, development, or establishment of any of its essential doctrines; and that such a work could not fail to be of material service to all who desire to study that branch of law systematically and in its original sources.

This searching of the original sources is so scientific and so rational a procedure that it is difficult to explain the hostility with which this innovation was received. Hardly one of the Boston lawyers had any faith in it. After the first lecture at the school, with Langdell's *Cases on Contracts* as the basis of discussion, the attendance dwindled to a handful of students who were stigmatized as Langdell's freshmen. These freshmen were among the best men of the school and their enthusiastic faith gradually converted others. But for several years the students were divided into Langdellians and anti-Langdellians, and after the disappearance of the latter, several years elapsed before Langdell's method was adopted by all his colleagues. To-day the Langdell method is adopted in whole or in part in a majority of the schools of the country, and in nearly all the best schools. After explaining his theory of legal education in the preface of his *Cases on Contracts*, Langdell never wrote a word in its behalf. His triumph was won solely by the influence of his teaching upon his pupils and by the impression made by them in the practice of their profession. His influence, already dominant, promises to be enduring.

In the class-room what most impressed his pupils

was his single-minded desire to get at the root of the matter. To this end, in the earlier years of his teaching, he welcomed their suggestions and criticisms, and they knowing that their views would be received and measured by the same tests by which he wished his own views to stand or fall, entered into the discussion with the keenest enthusiasm. In the seventies the curriculum was very meager as compared with the courses offered in the next two decades, but in one respect Langdell's pupils in the days when his innovations were on trial enjoyed an advantage denied to those who came to the school after the battle had been won. The master as a pioneer was blazing a new path and his disciples felt that they too were carrying an axe and were in some measure responsible for the master's success. The intellectual stimulus due to this feeling and to the delightful relations between him and his followers, was so great, that many of them, and the present writer is proud to count himself as one of them, recognize with gratitude that he did more for their intellectual development than any other man. Professor Beale, a pupil and colleague, says of his later teaching days:

When we entered his lecture-room we were struck by the massive intelligence of his brow, we admired his severe and almost impassive face, and we seemed to find the quiet intellectual atmosphere of the cloister. In our time, as a result of his failing sight, he never used the Socratic method in his teaching. He simply talked, slowly and quietly, stating, explaining, enforcing and reinforcing the principles which he found in the case under discussion. Our notebooks read like his articles on Equity

Jurisdiction; quiet, forceful, full of thought and requiring close study to follow them. His manner was usually as quiet as his words. Only now and then, when some subtle point was raised by Judge Mack or Professor Williston (not then judge or professor), his face would light up, and he would think aloud, to the vast delight of those members of his class who could follow him. Those were halcyon days. And once in a great while something would amuse him, and then he would throw back his head with a laugh that seemed to have the full strength of his mind in it.

While it was a liberal education to follow the working of his mind in the class-room, close attention and hard thinking were demanded of those who would keep up with his compact reasoning. His teaching was preëminently fitted for the cleverest men in the school. For this reason, especially in his later years, his classes were not large.

The influence of the law professor is rarely traceable into concrete results. But two statements of Langdell may be traced from the professor's chair, through his pupils, to the reported judgments of the court. When teaching Bills and Notes he described defenses which, following the *res*, were good against every holder, as real defenses, in contradistinction to personal defenses, which were good only against a particular person or some one in privity with him. This distinction was repeated by one of his pupils in a publication and afterwards mentioned with approval by the Supreme Court of Massachusetts.⁵ On

⁵ *Watson vs. Wyman*, 161 Massachusetts Reports, 96, 99-100. "Subject only to a personal defense, as it is happily called by Mr. Ames, 2 Ames, Bills and Notes, 811." Mr. Ames is glad of this opportunity to place the credit of this distinction where it truly belongs.

another occasion Langdell said that a negotiable bill or note became, after maturity, a mere chose in action. This remark was repeated by one of his pupils who had become a professor; a pupil of the latter used it in a brief and the court in giving its opinion adopted the statement of the successful counsel.⁶

Langdell was by nature a conservative. This may seem a rash statement to make of so great an innovator in legal education, and of so independent and original a writer and teacher. But the statement is true. He was conservative, but his conservatism yielded to his irresistible passion for the truth. After a patient and thorough investigation of a subject, he frequently reached conclusions at which he would have looked askance at the outset. He never had occasion to make a careful study of the subject of *Quasi-Contracts*. He never became quite reconciled to the introduction of this new term into our law, and he could hardly restrain his impatience if one spoke to him of the doctrine of unjust enrichment. Had he explored this subject in his exhaustive manner, it is quite certain that he would have adopted and made constant use of these terms. His passion for truth explains another seeming contradiction in his nature. He was extremely modest, but extremely tenacious of his convictions. This not from any pride of opinion, but because any one who would change his convictions, formed after painstaking ex-

⁶ *Hinckley vs. Union Pacific Co.*, 129 Massachusetts Reports, 52, 61.

amination and much reflection, must plough deeper than he had gone, and, by a wider generalization, expose the error of those convictions. Once convinced of error no one was readier to admit it. If Langdell ever swerved from his determination to see things as they are, it was unconsciously and because of the defect of another splendid quality, his extreme loyalty to his friends, which in him was almost feminine in its intensity.

Langdell had the gift of a cheerful nature. In the days of his poverty, one of his early friends writes, "he struggled with a smiling face." The same cheerful spirit sustained him in his later years, when failing eyesight debarred him from many pleasures and hampered him greatly in his investigations.

He cared little for general society, but was an excellent talker. His hearty laugh was as delightful in conversation as it was in the class-room. One always carried away from a talk with him some fruitful suggestion with renewed respect for the man as a deep and original thinker.

A career so rich in great achievements as Langdell's could not fail of ultimate recognition. Happily, in his case, the recognition came in his lifetime. Besides the honorary degree of Doctor of Laws, conferred upon him in 1875, he received from his university three honors, no one of which had been bestowed upon any other Harvard professor. When he became professor *emeritus* in 1900, his full salary was assured to him for life. In 1903 his name was

given to one of the law professorships, and the handsome new law building bears the name, Langdell Hall. His fame is growing as his ideas are making new converts. The sister, who cheered and helped the farmer's boy in his time of need, has the rich reward of knowing that her brother is likely to be regarded for generations as the greatest of American law professors.

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